

THE CAPITULATORY RÉGIME OF TURKEY

ITS HISTORY, ORIGIN, AND
NATURE

BY
NASIM SOUSA

A DISSERTATION

Submitted to the Board of University Studies of the Johns
Hopkins University in Conformity with the Requirements
for the Degree of Doctor of Philosophy

1930

Extract from: *The Capitulatory
Régime of Turkey*

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To
My Wife
Mary Elizabeth Sousa
this work is affectionately dedicated.

رَفَعُوا الْبِنَاءَ عَلَى السُّيُوفِ فَلَمْ يَدُمْ
 مَا لِلْبِنَاءِ عَلَى السُّيُوفِ دَوَامُ
 ابْقَى الْمَالِكِ مَا التَّفَاهُ أَسْهُ
 وَالْعَدْلُ فِيهِ حَائِطٌ وَدَعَامُ

« شرقى »

Mansions founded at the mouth of the cannon last not;
 For buildings based on arms crumble fast.
 Only empires on the rock of understanding erected,
 With justice for a base shall forever last.

—SHAWKY.



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PREFACE

The once mighty capitulatory institution which for centuries had formed the nucleus around which revolved most of the Turkish foreign relations is now dead—quite dead in Modern Turkey. There remain of it only the ashes of the great fires which had been kindling for decades on Ottoman soil. There remains the record of a continued struggle between the Western Powers, on the one side, and Turkey, on the other, the former striving with grim determination to continue the operation of the institution, the latter to abolish it.

This study is the first part of a larger study. It deals with the period preceding the outbreak of the World War, and the second part takes up the period following the outbreak of the War. The author gives an explanation of the origin of the capitulations wherein he takes the view, which is accepted by most authorities on the subject, that the capitulations have their origin in the once firmly established and universally accepted principle of “personality” of law, and that in no way is the Turkish religion or the Turkish system of laws to be viewed as the reason for the establishment of the capitulatory system as it has often been maintained by many writers; second, he gives an account of the nature and the contents of the capitulations; third, he presents a brief survey of the Turkish-American relations with

regard to the capitulations; and fourth, he records the historical evolution of the international recognition of the capitulations. In presenting this latter phase, the writer takes the view that three periods seem to be quite distinct: namely, the first period embracing the early exterritorial system which was voluntarily and *reciprocally* practiced and enforced by custom and usage; the second period involving the earliest capitulations conceded by the Turkish sultans which were *unilaterally* and *spontaneously* granted; the third period covering the latest capitulations in Turkey which were *unilateral* in the grant of privileges, but, being international in character, had somewhat the character of treaties.

In the second part of the work, it is attempted: first, to give a general account of the unilateral abrogation of the capitulations by Turkey in 1914; second, to describe briefly the situation during the War and the reestablishment of the capitulations by the Allied Powers after the close of the War; third, to present a short account of the Nationalist movement and of the Turkish opposition to the peace treaty of Sèvres which reestablished the capitulations; fourth, to trace the steps leading to the complete abolition of the capitulations by the Treaty of Lausanne, discussing in this connection American interests and participation; and, finally, to discuss, from a legal point of view, the principles involved in the abrogation of the capitulations. This work does not pretend to go into the present situation of

foreigners in Turkey as affected by the abrogation of the capitulations or the present conditions of foreigners in the territories detached from Turkey after the War. The author is not unaware of the significance of this phase, but he feels that this should form the subject of a special and separate study, which he hopes a qualified scholar may take up.

The most important and numerous contributions on the subject are French, this being largely due to the early French interests in the Ottoman Empire and the early friendly relations between the French monarchs and the Turkish Sultans. Most of these French writers, however, devote the greater part of their works to the relations concerned with France, and do not discuss the subject from an international point of view. So far as the author knows, the whole subject has not been extensively considered in any English treatise. Professor Brown's little book, entitled *Foreigners in Turkey*, is indeed a very valuable contribution, but the work covers only the period preceding the World War. An excellent article by Mr. L. E. Thayer, entitled "The Capitulations of the Ottoman Empire and the Question of their Abrogation as it affects the United States," found in *The American Journal of International Law* of 1923, is another English contribution. Writers on international law, especially the French, have, as a rule, considered the subject in their writings, but usually very briefly. Most American writers do not even mention the capitulations, this being

largely due to the lack of vital political and commercial interests on the part of the United States in the Near East.

A part of this work was awarded in 1929 the Alexander Wilbourne Weddell prize of \$250 given every year by the George Washington University "for the best essay on the general subject of the promotion of peace among the nations of the world." The author makes mention of this with grateful acknowledgment as it awakened in him a greater interest in the subject and encouraged him to enlarge and develop the original essay into the present volume.

The author takes this occasion to express his grateful feelings to Professor Charles E. Hill of the George Washington University for first awakening in him appreciation of the importance of the present subject and for personal counsel, and to Dr. James Hart for reading the manuscript, and making suggestions. The writer has received valuable practical suggestions and helpful criticism from Professor Westel W. Willoughby, whose kind help is gratefully acknowledged.

N. S.

BALTIMORE, MARYLAND
1930

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INTRODUCTION

DEFINITION

The word "capitulation" is sometimes used to signify an agreement made "in time of war for the surrender to a hostile armed force of a particular body of troops, a town or a territory."¹ The term has also been used by French writers to denote the oath which the Holy Roman Emperor took before the college of electors on his election.² The sense in which the term will be used in this study, however, carries no concept of surrender or oath, but bears the idea of an extraterritorial agreement by which a foreigner is, to a certain extent, allowed to enjoy on foreign soil the laws of his own country. In this respect, therefore, it is an expression which is likely to deceive. "The term 'capitulation,' " says Du Rausas, "is commonly attributed to the condition of foreigners in the Ottoman Empire as regulated by a series of treaties concluded between the Sublime Porte³ and most of the Christian states of Europe and America."⁴ Other definitions have

¹ *Encyclopædia Britannica*, ed. 11, V, 283.

² *Ibid.*, p. 283. Cf. also, *Dobson Encyclopedia*, 1798, IV, 138. The same term was also applied to agreements made regarding the enlistment of Swiss guards into the service of European powers. (See J. W. Foster, *The Practice of Diplomacy*, N. Y., 1906, p. 245.)

³ The expression "Sublime Porte" is often used to denote the Ottoman Government.

⁴ Du Rausas, *Le régime des capitulations dans l'empire ottoman*, I, 1.

been given by various authors;⁵ these, however, do not give an understanding of the character of the term unless they are supplemented by a brief introductory explanation.

ORIGIN OF THE TERM "CAPITULATION" AND ITS USE

The first time that the term was officially used to denote an agreement dates back to 1275 when the Greek Emperor issued a declaration concerning the Genoese referring to the articles therein as "capitula," and it is possible that shortly thereafter the

⁵ "This technical term," remarks Temperley, "covers a body of relationships between Turkey and certain foreign powers which, by long tradition, have come to be regarded as a coherent whole, though it would be almost impossible to codify them in a precise and logical form. The capitulations consist partly of written treaties, partly of customary rights; they concern not only the diplomatic relations of states, but the personal status of individuals; and they extend from the political into the judicial, financial and economic spheres of social intercourse." (*History of the Peace Conference of Paris*, VI, 96.)

The term "capitulations" will be used here in a general sense as descriptive of the privileges of autonomous jurisdiction as well as the other trading facilities, exemptions, and special rights of control granted to foreigners in the Orient. In this sense, the term will thus cover more than the extraterritorial rights which give the foreigner immunity from the jurisdiction of the Turkish courts. It will thus be so used as to make it extend over all relationships by which the status of foreigners in Turkey is determined. However, the term will be used in some cases, especially in treating the origin of the capitulations, to denote extraterritorial rights only, for the early capitulations had been largely concerned with extraterritorial rights given in confirmation of the system of personality of laws. The other rights, such as the financial control and the political rights, developed in the later period when Turkey began to decay.

term "capitulation" came to be used in this sense.⁶ The term is thus derived from the Medieval Latin, and signifies a treaty the terms of which are specified under articles (*capitula*) or minor heads of several stipulations.⁷ The term "capitulation," therefore, may be explained as designating a treaty by the terms of which foreigners resident in Turkey are entitled to special immunities and rights and are more or less subject to the laws of their respective countries.⁸

⁶ G. B. Rayndal, "The Origin of the Capitulations and of the Consular Institution," *S. Doc.* No. 34, 67th Cong., 1st sess., p. 35.

Sir Travers Twiss, however, is of the opinion that it is doubtful whether the term "capitulations" came into use before the treaty of 1535 between France and Turkey. He cites evidence of its use in a French dispatch dated Sept. 20, 1539. (*The Law of Nations Considered as Independent Political Communities*, 2d ed., I, 463.)

⁷ After the end of the eighteenth century, the term "capitulations" has been less frequently applied to the international agreements concluded between the Western Powers and Turkey. Yet, it is to be noted that although the latest treaties were not spoken of as "capitulations" they still bore the unilateral character in the grant of extraterritorial privileges.

⁸ The term "capitulation" has been sometimes referred to by some writers as implying the submission of unbelievers suing for peace to the Moslem Caliph. This, however, has been contested by many authors. (P. M. Brown, *Foreigners in Turkey*, p. 29 n.) It seems that this idea of submission may also be explained so as to imply the submission of the Sultan to the will of the foreign powers through the act of waiving some of his sovereign rights in their favor. Both suggestions, however, can hardly be accepted. In reply to the first idea, it is to be noted that the capitulations were not originally granted by the Sultans. The Sultans merely adopted the commonly accepted principles of immiscibility and extraterritoriality which had been commonly practiced before the development of Ottoman national existence. As to the second idea, it is substantiated by historical facts that the Sultans were at the zenith of their power

EARLIEST PRACTICE OF EXTERRITORIALITY

The practice of the principle of extrterritoriality,⁹ the principle by which a person in a foreign country is more or less subject to the laws of his own country, dates back to many centuries before Christ.¹⁰

when they confirmed the extrterritorial privileges which had been formerly granted. The deduction as to the submission of the Sultans to the will of the foreign powers may perhaps be suggestive to a certain extent in the later centuries when the capitulations came to operate in practice against the will of the Sultans who were becoming weaker and weaker; but this, again, can be refuted due to the fact that the term "capitulation" had come into use long before the decay of the Ottoman Empire. De Testa seems to assert that the correct equivalent for the term "capitulations" is "Letters of Privileges." "Nous croyons que la qualification *lettres patentes* répond assez exactment, quant à l'essence et à la forme tout ensemble, au mot turc *ahdnamé* qui sert plus spécialement à les désigner." (Testa, *Recueil des traités de la porte ottomane*, I, 6.)

⁹ Some writers treat the words "extrterritoriality" and "extraterritoriality" as identical; others as indicating, by the first, the privileges enjoyed by diplomats and their suites; by the second, the privileges of foreigners who by virtue of treaty stipulations are judged by their own laws in consular courts. (See Piggott, *Extrterritoriality*, p. 2.) The two words will be treated as identical in this text.

¹⁰ It is to be noted in this connection, that although the term "extrterritoriality" has been definitely placed in the phraseology of international law, it is inadequate and improperly used; for it is hardly practicable today that a foreigner is entirely subject to the laws of his own country when he enjoys extrterritorial rights in a foreign country. Foreigners in Turkey, for instance, were subject to Ottoman jurisdiction in matters dealing with land holding despite the capitulatory rights to which foreigners were entitled in Turkey. (See *infra*, pp. 81 ff.) Furthermore, in most criminal cases foreigners were denied in Turkey the benefit of their own consular courts. We must also consider the great influence of customs and local usages which impedes the absolute execution of the foreigner's native laws

As early as 1294 B. C., the Phœnicians from Tyre who settled at Memphis (Egypt) which was then under the reign of Protee (1294-1244 B. C.) were allowed to have temples of their own in the new settlement. Furthermore, merchants of Tyre were permitted in the twelfth century before Christ to reside and establish factories in three cities on the Tanitic branch of the Nile where they were given

in a foreign country. In a memorial issued by Lord Aberdeen's Government in 1844, along with the Foreign Jurisdiction Act, it was stated that the "right of British consular officers to exercise any jurisdiction in Turkey, in matters which in other countries come exclusively under the control of the local magistracy, depends originally on the extent to which that right has been conceded by the Sultans of Turkey to the British Crown, and therefore the right is strictly limited to the terms in which the concession is made." (J. Lorimer, *The Institutes of the Law of Nations*, I, 313.)

Sir Francis Piggott cites the case of *Carr v. Fracis, Times & Co.* (1902 A. C. 176) in which the seizure of a British vessel in the territorial waters of Muscat by the local authorities was justified. (Piggott, *Exterritoriality*, p. 8. See also *Dainese v. Hale* [91 U. S. Reports, 1875, p. 13] and *infra*, p. 121, "the theory of delegation.")

Thus, it is no surprise that many writers on international law agree as to the inadequacy of the term and its misleading character. It has been suggested that the term "immunity of jurisdiction" would be more accurate and satisfactory. (See P. M. Brown, *Foreigners in Turkey*, pp. 3, 60, 61.) "A foreigner who enters upon Turkish soil," says L. E. Thayer, "does not carry his own laws with him in reality." Mr. Thayer forms the opinion that the term "immunity from all but a special jurisdiction" would be more exact. (*A. J. I. L.*, 1923, XVII, 227.) Commenting on this point, C. C. Hyde remarks that "exemption from local jurisdiction does not imply exemption also from local control. . . . Although a particular individual may not be amenable to local process, he may, nevertheless, be prevented from committing acts regarded as detrimental to the public welfare, and rendered illegal by local enactment." (Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, Boston, 1922, I, 429.)

the privilege of living under their own laws and were allowed freedom of worship.¹¹

There is record of another case dating back to the year 526 B. C. whereby Greeks, migrating to Egypt to establish themselves in Naucratis, were allowed by Amasis (569-526 B. C.) freedom of worship and independent jurisdiction administered according to their own laws.¹² There is, after all, a wealthy source of material to support the evidence of a wide use of the principle of extritoriality in earlier centuries. Hence, if it is agreed that this principle forms the testing element of the capitulations, then the origin of the capitulations dates back to many centuries before Christ.

¹¹ See Brown, *Foreigners in Turkey*, p. 9, and T. Twiss, *The Law of Nations considered as Independent Political Communities*, 2d ed., I, 444.

¹² *Revue d'histoire diplomatique*, 1890, IV, 535.

"Amasis, being partial to the Greeks," says Herodotus, "both bestowed other favours on various of the Greeks, and moreover gave the city of Naucratis for such as arrived in Egypt to dwell in; and to such as did not wish to settle there, but only to trade by sea, he granted places where they might erect altars and temples to the gods." (*Herodotus*, Book II, ch. 178; see translation by H. Cary, London, 1908, p. 167.) On the question as to whether or not the Greeks had settled at Naucratis before the time of Amasis, cf. W. W. Howe and J. Wells, *A Commentary on Herodotus*, Oxford, 1912, pp. 253-254.

"The Egyptians," comments Phillipson, "often allowed foreign merchants to avail themselves of local judges of their choice and even of their own nationality in order to regulate questions and settle differences arising out of mercantile transactions, in accordance with their own foreign laws and customs: The Greeks especially enjoyed these privileges on Egyptian territory." (C. Phillipson, *The International Law and Custom of Ancient Greece and Rome*, London, 1911, I, 193.)

AMONG THE HEBREWS

Exterritorial arrangements are known to have existed among the Jews in earlier days. During their reign, the Hebrews allowed foreign tribes to live among them, permitting them to retain their own laws and traditions; while, on the other hand, foreign rulers allowed the Hebrews to live under Jewish laws and customs when the latter happened to come under foreign rule.¹³

THE GREEKS

In Greece, history tells us, the foreigner was looked upon as an enemy and treated with cruelty. Piracy was a sanctioned practice. "The fleets of Athens, the best disciplined and most respectable naval force in all antiquity, were exceedingly addicted to piratical excursions."¹⁴ Yet, there is record of the existence of an institution, known as the "proxenial institution,"¹⁵ corresponding to the consular agency established in Egypt.¹⁶ This institution which may be said to commence at about the end of the seventh century before the Christian era was largely the outcome of commercial intercourse and it recognized the principle of extraterritoriality whenever the question of foreigners arose.¹⁷

¹³ Ravndal, "The Origin of the Capitulations and of the Consular Institution," *S. Doc. No. 34*, 67th Cong., 1st sess., p. 8.

¹⁴ J. Kent, *Commentaries on American Law*, Boston, 1873, 12th ed., I, 5.

¹⁵ Cf. P. Monceaux, *Les proxénies grecques*, Paris, 1886.

¹⁶ See C. Phillipson, *op. cit.*, I, chs. v, vi.

¹⁷ Cf. *Revue d'histoire diplomatique*, 1890, IV, 535; also, R. Redslob, *Histoire des grands principes des gens*, Paris, 1923, p. 70.

"In order to belong to a political group in Greece it was indispen-

THE ROMANS

The treatment of the foreigner by the Romans did not differ from that of the Greeks. The Romans called both strangers and enemies *hostes*, obeying the axiom of ceaseless war against such *adversus hostem aeterna auctoritas*; but the cosmopolitan nature of Rome made it impossible for the Romans to drive the strangers from their midst, and while the latter were allowed to remain, they were refused the advantage of the sacred Roman law, *jus civile*, which was the exclusive law applying to the Roman citizen only. As a result, foreigners were allowed to settle their disputes according to their own laws and traditions. A new *praetor* was accordingly appointed (246 B. C.), called *praetor peregrinus*, who was given authority to adjust the controversy which arose from the various legal notions.¹⁸

sable to belong to a family group. As the extension of the family was the tribe, so the expansion of the tribe was the State. Hence transitory aliens and even, for the most part, such as were permanently resident within the territory, were not regarded (apart from special concessions) as being amenable to the ordinary established national juridical organizations, so that a special jurisdiction had per force to be introduced in the interests of justice and state policy." (C. Phillipson, *op. cit.*, I, 192.)

¹⁸ "It was a general principle which marked the early Roman policy in Italy to allow a subject community to retain its own municipal laws, and to administer justice between its own citizens, so far as this was consistent with a state of subjection to Rome." (W. C. Morey, *Outline of Roman Law*, N. Y., 1908, p. 64.) On the status and the functions of the *praetor peregrinus*, see *ibid.*, ch. ii; also, E. Cuq, *Manuel des institutions juridiques des romains*, Paris 1917, pp. 54-58, 92-94.

“ THE BARBARIANS ”

The principles of extritoriality were also thoroughly established and widely applied by “ the Barbarians.” In founding their new states, “ the Barbarians ” (Goths, Burgundians, Franks, Lombards, etc.) allowed the conquered peoples to keep their customs and laws. They did not try to incorporate the conquered population into their own nationality by imposing upon them the customs and the laws of the north.¹⁹ Each case was decided in pursuance of the personal law of the defendant.²⁰ “ The German,” says Prof. Emerton, “ thought of his legal rights as belonging to him, not because he was a member of the state, but because he was *himself*, the son of his fathers, and the heir of all that had seemed right to them. His law was a part of himself. He could no more change it or part with it than he could change or part with his own existence.”²¹

Barbarians who had settled in Macedonia and Asia Minor for farming purposes obtained possession of the villages and the districts where they resided and

¹⁹ “ Franks, Burgundians, Goths, Romans inhabited the same territory subject to their personal law respectively. One might see five persons converting together, no two of whom were accountable to the same authority.” (Ravndal, *op. cit.*, p. 10.)

²⁰ T. E. Holland, *Elements of Jurisprudence*, edition 10, Oxford, 1906, p. 401. Marriage was contracted in accordance with the law of the husband.

²¹ Emerton, *Introduction to the Study of the Middle Ages*, Boston, 1888, p. 75.

were granted the right to have their own domestic government and to propagate their native manners and customs. They acknowledged the sovereignty of the Emperor but without being required to submit to the magistrates of Rome.²²

This same principle was observed by the conquering nations in Great Britain until the eleventh century when Canute the Great made an attempt to blend the Danes and the Saxons into one united people, subject to the same laws and governed by the same religious institutions.

THE ARABS

No less was the principle of extraterritoriality observed by the Arabs. It is maintained by some historians that capitulations dating back to the days of Mohammed, the prophet of Islam, were granted. Mohammed, himself, is recorded as having granted certain extraterritorial privileges to the Christians in his dominions; ²³ these were embodied in a document known as "the testament of Mohammed."²⁴ The

²² Ravndal, *op. cit.*, p. 10.

²³ The exact date of the grant is calculated to have been October 6, 625 A. D.

²⁴ The original document is said to have been found in a convent, belonging to the Carmelite order of monks, in the neighborhood of Mecca. It provides for the protection of Christians, guarantees free exercise of worship, and makes fearful laws against the followers of Islam who would violate these terms of toleration. Christians were, on the other hand, to hold friendly relations with the Moslems and to refrain from extending any aid to the enemy of the Moslems. (The text is found in Van Dyck, E. A., "The Capitulations," *Senate Ex. Doc. 3*, 47th Cong., special sess., pp. 85-87; also in Alex. de

prophet is reported to have personally executed the provisions of this document.²⁵

Furthermore, Arab rulers have frequently been noted to have granted similar privileges to non-Moslem communities residing within their dominions. Shortly after the death of Mohammed (636-637 A. D.) when the Arabs captured Jerusalem, a chart was conceded by the third Caliph, Omar Ibn el Khattab, assuring to the Christian inhabitants freedom of worship and protection of property and churches. Certain exemptions were also granted under the terms of the chart.²⁶ This chart, accord-

Miltiz, *Manuel des consuls*, part 1, II, 495-499 and Charrière, *Négotiations de la France dans le Levant*, I, LXVI-LXIX.)

Some authors dispute the authenticity of the document; this can be refuted, however, by reason of the fact that mention was later made by Caliph Omar of a document of such character. (See *infra*, note 26; also, Lawrence, *Commentaire sur les éléments du droit international et sur l'histoire des progrès du droit des gens* de Henry Wheaton, IV, 106.)

²⁵ "I promise," said the prophet of Islam, "to protect the Christian magistrates in my provinces, with my infantry and my cavalry, with my auxiliary troops and with the faithful who follow me." (*Vide R. D. I. L. C.*, 1896, I, 120.)

²⁶ "That surety shall be equally granted to their churches, bells, and holy places, inside as well as outside. . . . They deserve all respect; for they have been formerly honored by the Prophet in a document of his own seal by which he exhorts us to treat them with respect and to give them protection. For this reason, we, true believers, are bound to be kind to them in honour of him who was kind to them. They must be exempted of the capitation tax and of dues in all the countries and on all the seas of the Muslimin. . . . The true believers of both sexes must obey this law—Sultans or chiefs are not excepted—and comply with it, be they rich or poor." (For text, see Miltiz, Alex. de, *Manuel des consuls*, part 1, II, 500; also, Famin, *Histoire de la rivalité et du protectorat des églises Chrétiennes en orient*, pp. 465-467.)

ing to Du Rausas, was faithfully and loyally observed as long as the Arabs remained the masters of Palestine.²⁷

It is also to be noted that an embassy is said to have been sent by Harun-el-Rashid to Charlemagne which produced the effect of increasing the toleration of Christian worship throughout Moslem countries.²⁸

CONCLUSION

The wide spread of the extraterritorial system has perhaps been promoted more by trade than by any other factor, although we must admit that conquests in the early centuries played a significant rôle and that the religious element had some influence on the development of the system. Its universality is evidenced by the various codes formulated in early times to regulate maritime intercourse. The principles of the Hanseatic League provided that its members were to be judged by their own laws wherever they might be engaged in commercial pursuits.²⁹

We conclude, therefore, that this extraterritorial or capitulatory system goes back to a remote age, and that the principle of personality of law which provides for autonomous jurisdiction to the stranger in a foreign land dates back to early centuries when the principle was widely practiced, commonly recognized, and faithfully observed.

²⁷ Du Rausas, *op. cit.*, I, 9.

²⁸ See *infra*, pp. 44 ff.

²⁹ Brown, *Foreigners in Turkey*, p. 14; Miltiz, *Manuel des consuls*, I, 141.

PART I
THE CAPITULATIONS PRIOR TO THE OUT-
BREAK OF THE WORLD WAR

CHAPTER I

THE HISTORICAL INTERPRETATION OF THE ORIGIN OF THE CAPITULATIONS

INTRODUCTORY

The view that the origin of the capitulations under which foreigners enjoyed extraterritorial rights in the Ottoman Empire is to be attributed to the wide religious and social gap separating the Moslem from his non-Moslem neighbor has been often upheld by many writers. It is maintained that since the Turkish judicial system did not provide for the protection of the legal rights of the foreigner, it was but natural and indispensable for the Turks to allow non-Moslems to maintain their own jurisdictions on Turkish soil if these were to reside in the Ottoman Empire at all; this the Turks did, which consequently gave rise to the capitulatory institution. Historical facts, however, prove the contrary, and whatever may have been the reasons for the spontaneous desire of the Turks to grant these extraterritorial concessions to non-Moslems, foreigners and natives alike, the fact remains that the capitulatory system had existed practically in the same form and had been operating for centuries before the fall of Constantinople at the hands of the Turks.¹ All that the Ottomans

¹ "The system of capitulations under which foreigners to-day reside in Turkey," wrote Sir Edwin Pears, "is the one under which

did was to sanction the continuation of the system after their conquest "in acknowledgment of the general practice of the times—a conformity to the accepted rules of international intercourse."² The extritorial system was not uncommon in the early centuries³ and became commoner after the breaking up of the Roman Empire.⁴ The origin of its wide application may be traced to the fifth century after Christ and may be attributed to the Visigoths in Spain after their conquest of that country.⁵ The

they have always resided there." (*The Fall of Constantinople*, N. Y., 1886, pp. 148-149.)

"When the Turkish rule was substituted for that of the Byzantine Emperors, the system already in existence was continued; the various non-Moslem peoples were allowed their semi-autonomy in matters affecting their personal status, and the Genoese of Galata were confirmed in their privileges." (*Encyclopædia Britannica*, 11th. ed., V, 284).

² Brown, *Foreigners in Turkey*, p. 28.

This is clearly shown in article XVI of the Capitulation of 1454, granted by the Turks to the Venetians shortly after the fall of Constantinople, which recognized the previous customary arrangements. The article provided "that his lordship of Venice may, if he desires, send to Constantinople a governor (consul), with his suite, *according to custom*, which governor (consul), shall have the privilege of ruling over, governing, and administering justice to the Venetians of every class and condition." (For text, see Ravndal, G. B., "The Origin of the Capitulations and of the Consular Institution," pp. 92-93.)

An exception to the general rule is manifested in this grant in that it was unilateral in character.

³ See *supra*, p. 4 et seq.

⁴ Sir Edwin Pears seems to describe the capitulations as "a survival in our own times of legal conceptions of the later Roman Empire." (See *Law Quarterly Review*, October, 1905, XXI, 408; also, C. Calvo, *Le droit international*, 5ème éd., Paris, 1896, II, 9.)

⁵ See Twiss, "Consular Jurisdiction in the Levant, etc." p. 4; Du Moiron, *Les juridictions Françaises en Orient*, etc., p. 14; *Mémoires de l'institut royal de France*, Académie des inscriptions et belles-

code of the Visigoths conceded to foreign merchants the privilege of being tried by judges selected from among their own countrymen.⁶

EXTERRITORIAL SYSTEM IN THE BYZANTINE EMPIRE

The extraterritorial system was later recognized and widely practiced in the Byzantine Empire: Venetians, Genoese, and nationals of other states had formed colonies of their own within the Empire; these were originally traders, and being allowed to reside in the Empire, they obtained privileges chief among which was the right to maintain a national independent jurisdiction.⁷ The consul of the colony was not only a diplomatic representative, but also a governor and judge; he was the legal protector of the nationals of his state.⁸

lettres, 1833, X, 26-27; Brown, *op. cit.*, p. 10. On the practice of extraterritoriality among the Barbarians, cf. *supra*, pp. 9 ff.

⁶ Miltiz, *Manuel des consuls*, I, livre 1, ch. iv, p. 161, sec. 2; part 1, livre 2, II, ch. i, p. 4, sec. 1, n. 2.

⁷ "Foreigners resident in (Byzantine) Constantinople," says Mr. Grosvenor, "were under their own laws and amenable to their own magistrates. Such, for example, was the case with the Venetians, the Amalfians, the Genoese, and the Pisans. This arrangement was an advantage to the Byzantine authorities and a convenience to the foreigner." (Grosvenor, *Constantinople*, Boston, 1900, II, 699.)

⁸ "The consuls held the offices of prefect, mayor, judge, and civil and police official. They filled the offices of registrar, notary, and bailiff." (Kandelafté, *L'avenir réservé au régime des capitulations en Turquie*, p. 101. See also, Bonfils (Fauchille), *Manuel de droit international public*, 7th ed., 1914, p. 497 and Féraud-Giraud, *États devant les tribunaux étrangers*, Paris, 1895, II, 5.)

The consuls were in the early period of the extraterritorial system appointed by the members of the community residing abroad and not by the home government as it came to be later and is at the present time.

Miltiz describes the foreign consulate as then existing in the Byzantine Empire as an "enclos" where the consul, the merchants and all their compatriots resided. This residence section was called *fonde*. It included a church, a bakehouse, a public bathing house, a tavern, a slaughter house, and a fish market; it also included the market where merchandise and food stuffs were sold.⁹ The consul was also to protect and inspect the church and to have supervision over all matters concerning the welfare of his community.¹⁰ In other words, the foreign community was under the protection and the jurisdiction of the homeland and its members held allegiance to the sovereign of their country as if they were residing in the original state.

THE "WARINGS"

Sir Edwin Pears calls attention to the fact that even before the Italian cities had begun to acquire extraterritorial rights from the Greek emperors, the so-called "Warings" who were then known as "Russians" had enjoyed capitulatory privileges in the Christian Empire. According to Sir Edwin, the first treaty made with the "Warings" was that of 905 which constituted the first capitulatory treaty between foreigners and the Greek Emperor.¹¹ These

⁹ Miltiz, part 1, II, 433.

¹⁰ Ibid., p. 428.

¹¹ See Pears, *The Fall of Constantinople*, p. 149; Brown, *Foreigners in Turkey*, pp. 11-12; Pears, *Turkey and its People*, p. 337.

“ Warings ” were of the same Scandinavian stock as the English and were the oldest foreigners in Constantinople. They used to trade with the Empire, importing slaves to Constantinople and exporting back into Waringia eastern produce and Byzantine gold. They made several attempts to capture Constantinople during the eleventh and the twelfth centuries, but they failed in their attempts and a treaty was finally concluded between the invaders and the Emperor providing for peaceful relations. The settlements of the “ Warings,” however, ceased to be of importance when other foreigners found their way to New Rome.¹²

THE ARMENIANS

We must also consider the privileges granted by Justinian to the Armenians domiciled in Constantinople. According to these privileges, the Armenians were allowed to reside in a quarter of their own and were granted certain rights of autonomous jurisdiction to the effect of settling among themselves questions relating to marriage, heritage, etc., in accordance with their own laws.¹³

¹² A treaty made with the Warings in 912 provided for trial of the “ Warings ” according to Russian Law, for extradition, for cases of shipwreck, and for administration of the property of Russians dying intestate. The text of a treaty made in 945 is found in Louis Paris, *Le chronique de Nestor*. The text of another treaty of friendship concluded between the “ Warings ” (sometimes called Warangians) and the Greeks in 911 is found in Ravndal, “ The Origin of the Capitulations and of the Consular Institution,” pp. 90-91.

¹³ Cf. Pears, *The Fall of Constantinople*, p. 148; also, *Missionary Herald*, November, 1914, CX, 496.

THE ITALIAN CITY STATES

Among the pioneer cities of Southern Europe, the Italian cities were the first to acquire extraterritorial privileges from the emperors of New Rome. As early as 991, the Venetians, domiciled in Constantinople, were allowed by the Greek Emperor to maintain their own jurisdiction,¹⁴ and in 1056 a treaty of commerce was concluded defining the extraterritorial privileges that the Venetians were to enjoy in Constantinople.¹⁵

In return for the help the Venetian fleet had extended to the Greek Emperor, Alexis Commene, capitulations were granted to the Venetians (1060) which exempted Venetian commerce in Rumania from taxation; the Venetians were, furthermore, exempted from the jurisdiction of Greek magistrates in all civil and criminal matters.¹⁶

A Bulla Aurea of the Emperor Alexis III (1199) conferred upon the Venetians the right of having their disputes settled by their own magistrates even when these disputes occurred between Venetians and subjects of the Empire.¹⁷

Similar privileges of extraterritorial character were given to the nationals of other cities residing in Con-

¹⁴ Brown, *Foreigners in Turkey*, p. 13.

¹⁵ Pears, *op. cit.*, p. 166.

¹⁶ Miltiz, *Manuel des consuls*, part 1, II, 19-20.

¹⁷ Evans, *Leading Cases on International Law*, 2d edition, 1922, p. 278, n.

stantinople. In 1056 the Amalfians obtained concessions; in 1098 the Genoese followed, and in 1110 the Pisans obtained theirs.¹⁸

THE EXTERRITORIAL SYSTEM AND THE CRUSADES

It was during the Crusades (1095-1291) that the practice of conceding exterritorial privileges became general.¹⁹ In consideration for the material support of the commercial cities to the Christian princes in their conquests in the East, exterritorial concessions in sweeping forms were given. Some of the cities had even stipulated before extending their assistance that certain exemptions and exterritorial privileges were to be conferred upon their merchants in the conquered region.²⁰

By the treaty of 1111, Venice was allowed to maintain a factory²¹ at Acre. Twelve years later, in consideration for the help they extended in the siege of

¹⁸ Pears, *The Fall of Constantinople*, p. 149.

¹⁹ For a brief historical account of the Crusades, see: Williams, *The Historians' History of the World*, 1904, VIII, 314 ff.; Du Rausas, op. cit., I, 15 ff.; Charrière, *Négotiations de la France*, etc., I, lxxii ff.

²⁰ "It is from that period that dates if not the origin, at least the development of the foreign consular institution which may be considered among the most remarkable effects that these immense armed pilgrimages produced upon the commercial and the maritime situation of Europe." (Miltiz, *Manuel des consuls*, part 1, II, 13.)

"De Steck and other writers," said Warden, "have conjectured that the Crusades gave birth to consular institutions." (Warden, *On the Origin, Nature, Progress, and Influence of Consular Establishments*, p. 60. See also, H. Bonfils (Fauchille), *Manuel de droit international public*, ed. 7, 1914, p. 495.)

²¹ The word factory is used here in the sense of an establishment or trading station where foreigners resided and carried on their trade.

Tyre, Venetian merchants acquired, after the occupation, the privilege of having a quarter and the right in that city for independent jurisdiction governed by their own laws.²²

In 1139 Baudouin II, who was given assistance by Venice on his escape from captivity, granted the Venetians commercial privileges and the right to maintain their national jurisdiction within the whole region of Jerusalem; Venice acquired also in 1221 similar concessions in Beirut including the right of anchorage from Jean d'Ibelin, the Seigneur of the city.²³

In 1187, Pisa acquired capitulatory rights in Tripoli.²⁴

In the charter of 1152, Marseilles was given extritorial privileges in Jerusalem; this was sanctioned by Pope Clement III in 1190, and later by Innocent IV in 1272.²⁵ Marseilles obtained also several other capitulations in Syria and Palestine. In return for their help in the conquests, the merchants of Marseilles acquired concessions in Beirut (1223) which were later confirmed by Pope Gregory IX (1230). They enjoyed furthermore, similar privileges in Tyre and Acre.²⁶

In February, 1243, Montpellier was granted various commercial privileges including extritorial

²² Miltiz, *op. cit.*, part 1, II, 27.

²³ *Ibid.*, p. 30.

²⁴ *Ibid.*, p. 439.

²⁵ *Ibid.*, part 1, II, 178.

²⁶ *Ibid.*, pp. 178-181.

rights in Antioch, Tripoli, and Constantinople; special quarters were assigned to its nationals in these cities.²⁷

EXTRITORIALITY IN CYPRUS

Venetian settlements are recorded as having existed in Cyprus in the early part of the fourteenth century. In 1306, the kingdom of Cyprus exempted the Venetians from taxation and granted them the privilege of being judged by their own magistrates; these privileges were confirmed by the succeeding kings in 1238 and in 1360.²⁸

EXTRITORIALITY IN NORTHERN ASIA MINOR

Commerce was not confined to the Mediterranean basin, but extended also to the shores of the Black Sea. By the treaty of 1303 with the Emperor, the Venetians acquired commercial privileges in Trebizond; the treaty was renewed in 1319 and again in 1364.²⁹

There is record, remarks Miltiz, of a treaty concluded in 1201 between Venice and the kingdom of Armenia, then known as "Small Armenia," granting the Venetians in Armenia exemptions and extritorial privileges; this was renewed in 1245 and again in 1333.

²⁷ Ibid., p. 200.

²⁸ Ibid., p. 32.

²⁹ Ibid., p. 40.

PRACTICE OF EXTERRITORIALITY IN EUROPE

It is interesting to note that the principle of exterritoriality was applied even among Italian neighboring cities whose laws and traditions were identical. At the close of the thirteenth century, Frederic II, king of Sicily, confirmed the exemptions and the privilege of independent national jurisdiction in criminal and civil matters formerly granted to the Genoese by the Norman princes;³⁰ and in 1285, James the First, another ruler of Sicily, granted several exemptions including the right of national jurisdiction to the Catalan merchants residing within his territory.³¹

The exterritorial system was also well recognized by other European countries: The Italian merchants of Genoa, Venice, Milan, Bologna, Rome, Pisa, Florence and other cities, engaged in trade with the principal French cities and residing there, were subject only to the jurisdiction of the special judges of their respective states; these judges were called "Captains of the University of Lombard and Tuscan merchants." In the chart of 1276, Philip the Hardy, king of France, granted several privileges and exemptions to the members of this mercantile university.³²

In 1174, Raymond V, count of Toulouse, granted the Genoese consuls a *fonde* at Saint-Gilles and a

³⁰ Ibid., p. 118.

³¹ Warden, *On the Origin, Nature, Progress, and Influence of Consular Establishments*, p. 58.

³² Miltiz, *op. cit.*, pp. 77-78.

quarter in the city for the habitation and trade of their nationals. The Genoese were exempted from all tolls and dues on their commerce, and, except in capital crimes, they were exempted from local jurisdiction.³³

The French cities also enjoyed similar privileges in Italian cities between 1252 and 1268; extraterritorial privileges were formally granted in a charter addressed to the consuls of Montpellier.³⁴

In 1402, Italian consulates were established in London and the Netherlands where they were granted authority to exercise jurisdiction over Italian nationals in civil and criminal matters. Similarly, Richard III, king of England, appointed in 1485 a certain Larent Strozzi upon whom he conferred judicial authority including jurisdiction over all Britishers settled in Italy.³⁵

By the treaty of peace of January 20, 1490, between Henry, king of England, and Jean, king of Denmark (art. 8), British merchants residing in Denmark, especially at Berghen, were given the right to elect their own judges who were to try all civil and criminal cases between British nationals.³⁶

³³ Germain, *Histoire du commerce de Montpellier antérieurement à l'ouverture du port de Cette*, Montpellier, 1861, pp. 98-100. (Cited in Bahi ed Dine Barakat, *Des privilèges et immunités dont jouissent les étrangers en Égypte*, p. 3.)

³⁴ Miltiz, op. cit., p. 203.

³⁵ Warden, op. cit., p. 72. See also Tarring, *British Consular Jurisdiction in the East*, p. 3 and *Revue d'histoire diplomatique*, 1890, IV, 546.

³⁶ Féraud-Giraud, *États devant les tribunaux étrangers*, Paris, 1895, II, 7.

In 1555, Iwan Wassiliwitch, emperor of Russia and grandduke of Novogorod and of Moscovy, granted a charter to the English by virtue of which British merchants were allowed to trade throughout the Russian dominions and to enjoy there complete independent national jurisdiction.³⁷

There is also a record of similar privileges being reciprocally granted by other European cities such as the German cities and the British trading posts.³⁸

EXTERRITORIALITY IN EUROPE IN THE SEVENTEENTH CENTURY AND AFTER

The most striking of all is that as late as the nineteenth century the exterritorial system continued to operate in some Western nations. By the treaty of Rio-Janeiro of February 19, 1810, British nationals were given special privileges in Portugal very similar to the immunities enjoyed under the capitulatory régime. In the different ports and cities of the kingdom of Portugal there were special British courts consisting of judges elected by the Brit-

³⁷ Warden, *On the Origin, Nature, Progress, and Influence of Consular Establishments*, p. 67.

³⁸ See *supra*, p. 12, "the Hanseatic League."

It is to be noted that in the reign of Richard I of England, a special court called the "Exchequer of the Jews" was established to decide all civil and criminal cases in which Jews were implicated, and purely civil cases in which both parties were Jews were generally referred to a purely Jewish tribunal to be decided by Jewish law. (See Henriques, *The Jews and the English Law*, Oxford, 1908, p. 54; also, Hyamson, *A History of the Jews in England*, London, 1908, p. 52.)

ish residents competent to try all cases submitted by British subjects.³⁹ The treaty continued in effect until 1842 when it was succeeded by the treaty of July 3, 1842.⁴⁰

The Hanseatic cities enjoyed similar privileges in Portugal; their privileges were extended to Andalusia in September, 1607, and to Castile in November of the same year.⁴¹

The treaty of November 14, 1788, concluded between France and the United States and abrogated by act of Congress on July 7, 1798, gave the privilege of special jurisdiction to each of the parties in the territory of the other: ⁴² Article XII of this convention stipulated that all differences and suits between French citizens in the United States or between Americans in France, particularly cases relative to wages or terms of engagements of the crews of the vessels, and all quarrels of whatever nature which may arise between the privates, between any of the privates and their captain, and between the captains of different vessels of their nation should be determined by the respective consuls and vice consuls; "no officer of the country, civil or military, shall interfere therein, or take any part whatever in the matter; and the appeals from the said consular

³⁹ The election of the judges by the British residents was subject to the approval of the British Government.

⁴⁰ Lawrence, *Commentaire sur les éléments du droit international*, Leipzig, 1880, IV, 2.

⁴¹ *Ibid.*, p. 2.

⁴² For the text of the treaty, see *Malloy*, I, 490-496.

sentences shall be carried before the tribunals of France or of the United States to whom it may appertain to take cognizance thereof.”⁴³ Article XIII provided for the establishment of special tribunals in the territory of each of the parties to try cases of commercial nature.⁴⁴

And, finally, we should note that the system of extritoriality operated in Christian Bulgaria even after Bulgaria had been recognized as a sovereign country, and, theoretically, the system continued to exist there even after the close of the World War.⁴⁵

⁴³ See also, Moore, *Digest of International Law*, II, 83-85.

⁴⁴ “The general utility of commerce having caused to be established within the dominions of the most Christian King particular tribunals and forms for expediting the decision of commercial affairs, the merchants of the United States shall enjoy the benefit of these establishments; and the congress of the United States will provide in the manner the most conformable to its laws for the establishment of equivalent advantages in favor of the French merchants, for the prompt despatch and decision of affairs of the same nature.”

⁴⁵ Bulgaria won its autonomy by the treaty of Berlin of July 13, 1878 (*St. P.*, LXIX, 749-768). It was stipulated in that treaty (article VIII) that the capitulations in Bulgaria were to remain in force and no modification of the *status quo* was to be allowed without the consent of the powers concerned. (Cf. *infra*, p. 170.) Since then, the Government of Sofia has been endeavoring for many years to put an end to the capitulatory system which was looked upon as a foe to the patriotic spirit of the Bulgarian people. By the Franco-Bulgarian commercial treaty of January 13, 1906 (De Clercq, *Recueil des traités de la France*, 1905-1906, XXIII, 292-293, articles XXI, XXII, XXIII), France relinquished her capitulatory rights in Bulgaria, but in a declaration of the same date (*ibid.*, XXIII, 314) this relinquishment was made conditional and was to become effective only when Germany, Austria-Hungary, Great Britain, Italy, and Russia would have relinquished their capitulatory rights there. By an agreement, dated Dec. 8, 1905 (Martens, *Nouveau recueil général de traités*,

CONCLUSION

We conclude, therefore, that the origin of the capitulations goes back to the Christian era and that the Mohammedan religion or the Ottoman legal codes are not to be deemed the original causes of the establishment of the extraterritorial system in Tur-

2ème série, XXXIV, 747), Great Britain similarly consented to give up her capitulatory rights in Bulgaria as soon as Germany, Austria-Hungary, France, Italy, and Russia should have renounced theirs. Bulgaria, however, failed in her efforts to win the consent of all the powers concerned, and the capitulations consequently remained in vigor. Soon after Bulgaria's independence was proclaimed in 1908, the Bulgarian Minister of Justice issued a confidential circular by which the heads of the judicial authority in the country were instructed to give no account thereafter of the system of the capitulations in conducting their judicial functions. This unilateral act on the part of Bulgaria was immediately protested by the foreign diplomatic agents, and, in response, the Bulgarian Government decided to negotiate with the powers; but, up to the outbreak of the World War, no fruitful results were achieved of these negotiations, and the entrance of Bulgaria into the War on the side of the Central powers in 1915 made the continuation of negotiations impossible.

The treaty of Neuilly signed by Bulgaria on November 27, 1919, (*Treaty Series*, 1920, No. 5, *Cmd.* 522; also, *A. J. I. L.*, Supplement, XIV, p. 245), explicitly asserted the consideration that the capitulatory system had always existed in Bulgaria and provided that its modification or suppression could be effected only through agreements to be reached by Bulgaria with each of the Allied Associated Powers to this end. Art. CLXXV of the Treaty (*Treaty Series*, 1920, No. 5, *Cmd.*, 522, p. 43, sec. 2) declared that "the immunities and privileges of foreigners as well as the rights of jurisdiction and of consular protection enjoyed by the Allied and Associated Powers in Bulgaria by virtue of the capitulations, usages and treaties, may form the subject of special conventions between each of the Allied and Associated Powers concerned and Bulgaria." (See: Calary de Lamazière, *Les capitulations en Bulgarie*; Caleb, *Du régime des capitulations en Turquie par rapport à la Bulgarie*, 1907; Despagnet, F., *Cours de droit international public*, 4th ed., Paris, 1910, pp. 498 ff.;

key, as it is frequently believed,⁴⁶ although we must admit that religion and the difference in judicial systems have been a major factor, later, when the Western Powers insisted on the continuation of the capitulatory institution in the Ottoman Empire.⁴⁷ In

Dillon, "Abolition of Capitulations in Bulgaria," *Contemporary Review*, November, 1908, XCIV, 525-526; Dislere, P. et R. de Mouy, *Droits et devoirs des Français dans les pays d'orient et d'extrême orient*, 1893, p. 112; Fauchille, *Traité de droit international public*, 3ème partie, Paris, 1926, I, 180; Merignhac, "Les capitulations et l'incident Franco-Bulgare de 1891," *R. D. I. L. C.*, 1892, XXIV, 147-169; Willoughby and Fenwick, *Types of Restricted Sovereignty and of Colonial Autonomy*, Wash. Govt. Printing Office, 1919, pp. 22-25.)

Although the Powers did not claim any capitulatory privileges in Bulgaria after the War, it was not until 1925 that Great Britain expressly recognized the condition of reciprocity in its commercial relations with Bulgaria. See "Notes Exchanged between the United Kingdom and Bulgaria providing for the Provisional Regulation of Commercial Relations between the two Countries" (*Treaty Series*, No. 53 [1925], *Cmd.* 2556.)

⁴⁶ Du Rausas seems to agree that the dissimilarity of laws, religious rites or traditions cannot be deemed to be the explanation for the origin of the capitulations. He maintains that if it were exact to say that the exceptional treatment of foreigners in Turkey was caused by the dissimilarity between Christian and Moslem institutions, the situation would have consequently necessitated the making of reciprocal grants of extraterritorial concessions, namely, Turkish subjects should have been given extraterritorial rights in Christian countries, but this was not done, and the capitulations are, in this respect, unilateral in grant and practice. Du Rausas further explains the opinion that no motives of economic character can be accredited to the origin of the capitulations. (See Du Rausas, *Le régime des capitulations dans l'empire ottoman*, I, 13-15.)

⁴⁷ "Il faut voir l'origine des capitulations comme une suite naturelle des idées au moyen-âge, et la différence de religion ou de civilisation n'a pu être prise en considération que plus tard lorsqu'il s'est agi de forcer la Turquie au maintien des anciens privilèges." (Aliotti, *Les Français en Turquie*, etc., p. 27.)

other words, the institution, as it originated, had little in common with race, religion or region;⁴⁸ it

⁴⁸ In his article, "Islam, Personal Law and the Capitulations," Pierre Crabites, American Judge on the Egyptian mixed tribunal, seems to stress the idea that the system of personality of laws is "one of the pillars of Islam, *erected* by Islam itself, and symbolizing one of the most venerable of its traditions." He maintains that the system of territoriality of law is entirely unknown to the Mohammedans who, unlike the western people, cannot think in terms of territorial laws. So he concludes that the abolition of the capitulations would inevitably destroy one of the most basic principles of Islam. (Cf. *The Moslem World*, April, 1928, XVIII, 173-176.) Crabites seems to ignore the fact that the system of personality of laws had been a commonly recognized principle among all the nations, western as well as eastern, Christian as well as Mohammedan. Islam did *sanction* the principle of personality of law, but did not *erect* it. "The Turk," says Abbott, "had found this system already established in the Greek Empire, and adopted it as he adopted so many other Byzantine customs, good and bad." (*Turkey, Greece and the Great Powers*, N. Y., 1917, p. 4.) The change in the social, political, and economic order of society is chiefly responsible for the development of the new idea of territoriality of law, and Mohammedan countries were certainly influenced by the same factors which led westerners to think in terms of territoriality of law.

Gontaut Biron similarly seems to ignore the fact that the capitulations had existed long before the coming into power of the Turks. He gives as a reason for the existence of the capitulatory system "the deep-seated inaptitude of the Turks to govern," as a result of which the western powers sought practical means to safeguard the interests of the Christian states and their subjects by establishing the extraterritorial system. "From that day," he concludes, "the idea of a capitulatory régime was *created*." (Gontaut Biron et L. de Révérènd, *D'Angora à Lausanne*, pp. 107-108.)

Dr. C. Hamlin, on the other hand, seems to conclude that the capitulations are contrary to the spirit of Islam. "They were designed," he says, "to encourage commerce and intercourse with foreigners, and are contrary to the exclusive and insolvent spirit of Islam." (*Our Day*, May, 1887, No. 17, III, 478.) This view again, if not groundless, certainly goes to the extreme; for Islam laid no barriers against the practice of the extraterritorial system. In a word,

was independently established without regard to any of these three factors.⁴⁹

The religious gap separating the Christian from the Moslem world does not constitute the cause for the origin of the capitulatory system,⁵⁰ although it somewhat explains the reasons for the continuation of the system in Moslem countries when it disappeared in the Christian world. The profound difference in religion, laws and customs does not give

the capitulatory system is not *contrary* to Islamic rites; neither was the institution *erected* or *created* by Islam. What Islam did was to *sanction* the existing system of intercourse between foreigners and natives and can by no means be deemed as responsible for the origin or the existence of the system.

⁴⁹ It has been indicated that extraterritorial privileges were reciprocally granted and practiced by Christian nations and that the capitulatory system was not confined to Moslem-Christian relations. It is also to be noted that the system operated even between Moslems themselves. As late as 1875, Moslem Turkey granted extraterritorial rights in sweeping form to Moslem Persians residing in Turkey. See art. 7 of the Turco-Persian convention of December 20, 1875. (Noradounghian, *Recueil d'actes internationaux de l'empire ottoman*, III, 391-394.)

⁵⁰ "The principle of the capitulations was the old one—taken over from antique Mediterranean and Byzantine jurisprudence—that the sovereignty of a state applied only to its subjects." (Shotwell, *International Conciliation*, pamphlet No. 180, November, 1922, p. 482.)

"It began as part of the early policy of law, of practice, of policy, and of immemorial tradition under the Roman Empire and far earlier, that every stranger in a strange land remained under the jurisdiction of his own nation and his own people and lived apart in a special area assigned to him and to his people." (Talcott Williams, *Turkey: A World Problem of to-day*, pp. 272-273.)

"Historically, it must be admitted that the present position of foreigners in Turkey is an outgrowth, not of any special arrangements made when Constantinople passed out of Christian hands, but of institutions sanctioned by the Byzantine Emperors." (Eliot, *Turkey in Europe*, p. 123.)

an answer to the question as to why the extraterritorial system existed in the middle ages among peoples of the same creed and culture, and *a fortiori* it by no means furnishes the explanation for the origin of the capitulatory institution.

The capitulatory régime has its origin in a once universally observed principle, namely, the principle of "personality of law" by which the foreigner carried his own laws wherever he went.⁵¹ In origin, it was the development of a normal procedure; it is exceptional now, because, with the decline of the city state of the middle ages, jurisdiction, throughout all progressive nations, has become territorial. The firmly established theory of "territorial right" (*jus territoriale*) by which a state has exclusive sovereignty over its territory gave an anomalous character to the capitulatory system. It is thus clear that there had been no derogation from sovereignty as then conceived nor any disparagement to an independent existence when Turkey had followed the steps of the Christian emperors in the grant of capitulations after the capture of Constantinople.

⁵¹ "Les capitulations nous apparaissent ainsi comme l'expression positive dans le domaine des faits internationaux du système de la personnalité des lois." (Du Rausas, *Le régime des capitulations dans l'empire ottoman*, I, 21.)

CHAPTER II

THE FOREIGNER IN MOSLEM LAW

INTRODUCTORY

What is the status of the foreigner in Moslem law? Is he deemed an outlaw in Moslem society or is he entitled to justice and protection on Moslem territory? It is to be noted, in this connection, that indeed few writers have impartially discussed this question; consciously or unconsciously, religious sentiment has played a great part in the explanation of the situation. It has been claimed by many western authors that Moslem law does not concern itself with the foreigner, that it does not provide for his protection, and that it is only in the capitulations that the foreigner can find his guarantees.¹ "The Moslem law," says Du Rausas, "does not concern itself with the foreigner, for it looks upon him as infidel; that is to

¹ "There is, outside of the Capitulations or of compulsion by external power," says A. D. F. Hamlin, "no right of legation, no immunity of ambassadors, no right to the protection of life and property, to trial by one's peers, to immunity from arrest without due process of law, to testify in court, to be represented by an advocate, to travel, to carry on business, even to live, for any one not a Moslem." (*The Forum*, July, 1897, XXIII, 526.) Continuing, Mr. Hamlin asserts that "the Capitulations are a necessity of the situation. Only by their protection is the resident foreigner enabled to live, travel, worship, and do business without fear of constant interference and oppression. . . . The Capitulations are the charter of life, liberty, and the pursuit of happiness for the foreign resident in Turkey." (*Ibid.*, pp. 528-530.)

say, it places him out of right, and guarantees neither his life nor his liberty or his property.”² In other words, according to this school of writers, the explanation of the existence of the capitulations in Turkey is to be found in the inimical view of Islam towards the foreigner. They maintain that Islam divides the world in two parts, namely: “Dar-ul-Islam” or the house of Islam to which all Moslems belong; and “Dar-ul-harb” or the house of war to which all non-Moslems belong. According to them, Islam preaches a continual warfare with the non-Moslems and there can only be a temporary peace in the form of a truce and in the making of certain guaranties. This has been and continues to be the view of the vast majority of western writers and of missionaries to the east in particular. It is largely based on certain passages of the Koran, the Moslem holy book:

“When ye encounter the unbelievers, strike off their heads until ye have made a great slaughter among them; and bind them in bonds.”³

“O true believers, enter not into friendship with a people against whom God is incensed.”⁴

Is this view correct or justified? The following discussion is intended to give an answer based largely on the primary sources of Islamic rites and legal codes.

² Du Rausas, *Le régime des capitulations dans l'empire ottoman*, I, 126.

³ *Koran*, Sura XLVII, verse 4.

⁴ *Ibid.*, Sura LX.

ISLAM

Islam, like all primitive societies, is governed by sacred law. Its regulations are chiefly concerned with the members of the Moslem community. No need was foreseen for any special provisions to define the judicial standing of the foreigner as long as the principle of "personality of law" had been long in practice and universally adopted. All that was necessary was the pledge for the protection of the foreigner and the respect of his individual rights as a member of *his* community, and to this, as we shall see, the Moslem code did not fail to give attention. A better idea may be had if we briefly analyze the attitude of Islam towards human society in general. Islam classifies the people of the world under four categories, namely: (a) The Moslems; (b) the Kitaby; (c) the Mustamins; (d) the Harby.

THE MOSLEMS

The Moslems are those who believe in Islam and its prophet and who are to be treated equally and are to enjoy equal rights with no distinction or discrimination whatsoever.

THE "KITABY"

The "Kitaby," or the people of the book, are those who have received revelations, namely, the Jews and the Christians; these are recognized by Islam and are to be offered protection; they are to

be distinguished from the “ Harby ” against whom fighting is to be continued.⁵

Some authors still cherish the opinion that Islam recognizes no other religion but Islam. The facts, however, give us evidence to the contrary; for Islam not only offers protection to the “ Kitaby,” but also sanctions the diversity of religions. “ The Prophet’s chief political innovation was the recognition of tolerated religions.”⁶

“ Unto every one of you,” says the Koran, “ have we given a law, and an open path; and if God had pleased, he had surely made you one people; but he hath thought fit to give you different laws, that he might try you in that which he hath given you respectively.”⁷

There are several passages in the Koran which assure the protection of “ the people of the book ” and make tolerance to their creed an obligation. No words can be more explicit in expressing the respect of the prophet of Islam to the *Kitaby*’s religions than the following passage:

“ Surely those who believe, and those who Judaize, and Christians, and Sabians, whoever believeth in God, and the last day, and doth that which is right, they shall have their reward with their Lord; there shall come no fear on them, neither shall they be grieved. . . . Say, we believe in God, and that which hath been sent down unto us, . . . and that which was delivered unto Moses, and Jesus, and that which

⁵ See *infra*, p. 40.

⁶ *British Foreign Office, Historical Section, Peace Handbooks*, No. 57, X, 12.

⁷ *Koran*, Sura V.

was delivered unto the prophets from their Lord; We make no distinction between any of them, and to God are we resigned.”⁸

Another passage reads :

“ We also caused Jesus the son of Mary to follow the footsteps of the prophets, confirming the law which was sent down before him; and we gave him the Gospel, containing direction and light; confirming also the law which was given before it, and a direction and admonition unto those who fear God.”⁹

The “ Zimmis,” or the “ Kitaby ” residing in Moslem territory, were consequently given a special social status and were entitled to protection. Generally speaking, their assimilation in the social order of Islam was not insisted upon; they were allowed to live freely in their quarters under their own laws subject to the payment of certain taxes, the “ Jizyah,” which were imposed in proportion to wealth.

THE “ MUSTAMIN ”

The people coming under the third category are the “ Mustamins,” the class of people which concerns us most, for these are the temporarily residing foreigners in Moslem territory. Contrary to the common belief, Moslem law clearly defines the status of the foreigner in addition to its recognition of the principle of personal laws in the treatment of the

⁸ *Koran*, Sura II, verses 59, 130.

⁹ *Ibid.*, Sura V, verse 50. “ Les Musulmans, ne l'oublions pas, ont une haute idée des vertus et du pouvoir miraculeux de Jésus-Christ.” (Nys, *Études de droit international et de droit politique*, Paris, 1896, p. 49.)

foreigner. Chapter III of the Islamic political code ¹⁰ reads as follows :

When he enters with the express permission of the sovereign or his representatives, the foreigner ought to enjoy in Moslem territory the protection of the laws. Commentary. By this permission, protection and safe conduct (eman) is accorded to the foreigner who, in consequence, is called Mustamin, that is to say, placed under the protection of the State. If necessary, any Moslem, provided he be a freeman, may also grant to a foreigner at the frontier entrance into the country, and his guarantee should be respected.¹¹

Moslem law, furthermore, provides that a foreigner may reside in Moslem territory during which period he is exempted from taxation, but if he resides more than one year, he becomes *ipso facto* a non-Moslem resident subject to the special tax imposed on the "Zimmi."¹²

That the word "Mustamin" bears nothing suggestive of a stigma of inferiority is clearly shown in

¹⁰ This political code is one of the five parts in which the general code is divided. The general code, known as "Mltaka-ul-ebhar" (confluence of the seas) and comprising the religious, civil, commercial, political, and military codes, was drawn up under the reign of Soleiman, II (1520-1566) and it has been the main authority in Moslem jurisdiction in Turkey ever since. It was translated into French by Mouradja d'Ohsson, the Swede Chargé d'Affaires to Turkey under the title of *Tableau général de l'empire ottoman*. The first volume appeared in 1787.

¹¹ Mouradja d'Ohsson, *op. cit.*, IV, 37.

¹² "The foreigner may not dwell in our territory a whole year, and it shall be said to him, if thou dwellest a year we will impose upon thee the personal tax (djiziah); and if he dwell a year he becomes *ipso facto* a tributary (Dhimmi)." (Van Dyck, "Report on the Capitulations of the Ottoman Empire," *S. Ex. Doc.* No. 87 [vol. IV], 47th Cong., 1st sess., p. 5.)

the next chapter of the code which provides that Moslems residing in a foreign country should be called by the same term :

“A Moslem should not go to a foreign land except under the pledge of a public safeconduct. Commentary. Likewise he should then bear the title of Mustamin as the foreigner in Moslem lands.” ¹³

Hence, we must admit that Moslem law takes care of the foreigner residing in Moslem territory and gives him the necessary protection in the enjoyment of freedom of travel and safe residence. Can we make now any other conclusion than that there is an evident fallacy in the theory of perpetual hostility between Islam and international law ¹⁴ concerning the treatment of the foreigner? “ It would be difficult,” remarks Professor Brown, “ to express in simpler terms the rights of foreigners under the laws of nations than in the words of this Moslem code.” ¹⁵

THE “ HARBY ”

And finally come the “ Harby ” with whom war may be continued. These are called “ Mushrekin ” or idolaters.¹⁶ It is to be noted that even with these

¹³ Mouradja d'Ohsson, *Tableau général de l'empire ottoman*, IV, 44.

¹⁴ Dr. Hamlin, an ardent exponent of this theory, emphatically states that “ the law of nations is absolutely incompatible with Mohammedan principles.” (*The Forum*, July, 1897, XXIII, 526.)

¹⁵ Brown, *Foreigners in Turkey*, p. 7.

¹⁶ We should note, in this connection, that the passages upon which western writers base their conclusions (cf. *supra*, pp. 34-35) apply to these idolaters and not to the people of the book or the Christian foreigners.

a truce may be made; and in case such an agreement is concluded, the Koran makes it a duty to observe the terms thereof:

"Wherefore perform the covenant which ye shall have made with them," says the Koran, "until their time shall be elapsed . . . , and when the months wherein ye are not allowed to attack them shall be past, kill the idolaters where-soever ye shall find them, and take them prisoners, and besiege them, and lay wait for them in every convenient place. But if they shall repent, and observe the appointed times of prayer, and pay the legal alms, dismiss them freely."¹⁷

The Koran also provides that the idolaters be protected when they have surrendered:

"And if any of the idolaters shall demand protection of thee, grant him protection, that he may hear the word of God; and afterwards let him reach the place of his security. This shall thou do, because they are people which know not the excellency of the religion thou preachest."¹⁸

¹⁷ *Koran*, Sura IX.

¹⁸ *Koran*, Sura IX, verses 8, 9.

The Moslems did not neglect to observe the laws of war and humanity in their wars against the infidels. In the conquest of Syria by the Arabs, the Kaliph Abou-Bekr, addressing his troops, made the following recommendations: "Combatez franchement et loyalement; n'usez pas de perfidie envers vos ennemis; ne mutilez pas les vaincus; ne tuez ni les vieillards, ni les enfants, ni les femmes; ne détruisez pas les palmiers; ne brûlez pas les maisons; ne coupez pas les arbres fruitiers; n'égorgez pas le bétail, à l'exception de ce qu'il faudra pour votre nourriture. Vous trouverez sur votre route des hommes vivant dans la solitude et la méditation, voués à l'adoration du seigneur; ne leur faites point de mal." (Nys, *Études de droit international et de droit politique*, Paris, 1896, p. 48.)

Count Ostrorog summarizes the Moslem code of war as follows: "When war is declared, even if it is occasioned by the enemy's treacherous aggression, all the enemy's subjects in the land must be

CONCLUSION

In the light of these considerations, can we conclude other than there is no basis for the theory of an irreconcilable hostility between Islam and the foreigner? "The designation of non-Moslems as members of the *house of war*," says Mr. Brown, "would seem to have no practical value in determining the juridical status of foreigners in Turkey. It may properly be as an approximate equivalent of 'hostis' as applied by the Romans to foreigners, or of 'barbarian' as used by the Greeks."¹⁹

Now that it has been explained that Islam is not to be accredited with the origin of the capitulations and that Moslem law is not to be deemed as hostile to the foreigner residing on Mohammedan soil, we shall proceed next to give a general account of the capitulatory régime to which a historical introduction will be given in the next chapter.

free to depart. Further in order to make sure that they shall not be molested, women and children must be escorted to the frontier. During military operations, it is forbidden to touch women, children, the aged, priests, and also such men of trade, handicraft or mental service as have no fighting capacity." (Léon Ostrorog, *The Turkish Problem*, London, 1919, p. 19.)

¹⁹ P. M. Brown, *Foreigners in Turkey*, pp. 5-6.

CHAPTER III

HISTORICAL CONSIDERATIONS

INTRODUCTORY

Until the victory of the Turkish Sultan which marked the end of the rule of the Byzantine Emperor, we can hardly speak of Turkey as an internationally recognized state, despite the fact that there had been several agreements entered into between the Sultan and the neighboring Christian city states. The Turks were more or less a group of warriors organized under the leadership of the Sultan who was both ruler and commander in chief of the armed forces. But the situation took an entirely different outlook when in 1453 the City of Constantinople fell into the hands of the Turks. The triumph of the Crescent over the Cross brought a large non-Moslem population under Turkish rule. In a comparatively short period, the Ottoman Sultan succeeded in extending his rule in Europe, Asia and Africa to such an extent that he obtained control over trade routes then constituting the chief highway of commerce between East and West.¹ More-

¹ It is commonly believed that the search for new routes to India that eventually led Columbus to the discovery of the New World was caused by the expansion of the Turks who, by blocking the main Asian land routes of European trade with the Orient, stimulated the western nations to turn their eyes towards the Atlantic for

over, the Turks gave up commerce to foreigners, consequently increasing the foreign element in the Empire.

ARABIAN INSTITUTIONS AND TURKISH CONTACT

It is to be remembered that long before the Turks appeared on the stage as a conquering power there had been Arab dynasties of higher civilization who professed Mohammedanism, and as it has often been that people coming in contact with a higher civilized community copy the fundamental principles of that civilization, so it was with the Turks. They had little to give but much to adopt. They embraced Islam, the religion of the Arabs, and copied many of the Arabian institutions and practices.² Thus the Moslem Arabs set an enlightened example to their Ottoman successors in the grant of freedom of worship and liberty to trade, including extraterritorial rights, to non-Moslems, and in the extension of protection to Christian judges; for the Koran says, "they who

a sea route. (See Chirol, V., *The Occident and the Orient*, Chicago, 1924, pp. 27-30.) This is refuted, however, by Professor Lybyer, who maintains that "the discovery of the route around Africa to Asia was not caused by the advance of the Turks. They did not acquire Syria and Egypt until after the turning of the Cape, and so did not block the trade-routes." (See *The Question of the Near East*. Institute of International Education, International Relations Clubs, Syllabus No. VII, p. 17; also, "The Influence of the Rise of the Ottoman Turks upon the Routes of Oriental Trade," Annual Report of the *American Historical Association* for the year 1914, I, 125-133.)

² The early contact of the Turks with the Arabs was through their enlistment as mercenary guards at the courts of the Caliphs of Bagdad.

have received the gospel, might judge according to what God hath revealed therein; and whoso judgeth not according to what God hath revealed, they are transgressors.”³

As conquerors the Arabs, in most cases, allowed the vanquished to keep their own laws and traditions, and as residents in a foreign country they insisted on being granted a similar privilege.⁴

As early as the time of the reign of Caliph Harun el-Rashid there is record of agreements entered into between the Caliph and Charlemagne under which the kings of France later claimed the guardianship of the holy places in Jerusalem.⁵

The Arabs had also obtained in China in the ninth century the privilege of having a Mohammedan

³ *Koran*, Sura V, verse 51.

⁴ The Arabs in Spain, for instance, allowed the Christian population to maintain their own jurisdiction. Similarly, when the Arabs invaded Sind, as in Spain, they allowed the people of that region to exercise their own creed and to be judged by their own laws. On the other hand, Arab communities residing in foreign countries enjoyed similar exterritorial privileges. There had been, according to Masudi who visited India in 916, a community of some 10,000 Arabs in the region of Saimur (near Bombay) which was governed by a Mohammedan magistrate to whose courts the members of the community were amenable. Similar conditions existed in the maritime towns of the Balhara, between Cambay and Saimur, and in Calcutta where Mohammedans settled for purposes of trade. In these places, the Mohammedans were also allowed to have their own mosques and to summon their congregations by the usual mode of proclaiming the times of prayer. (See Ravndal, “The Origin of the Capitulations, etc.,” *S. Doc.*, No. 34, 67th Cong., 1st sess., pp. 14-15.)

⁵ Charrière, *Négociations de la France dans le Levant*, I, lxx-lxx. Cf. also, *supra*, p. 12.

judge at Kan fou (Canton) ⁶ who was to try according to Moslem law all cases between Mohammedan merchants trading at that port.⁷

It is to be noted that the Arabs who were residing in Corsica and Sicily were similarly allowed to have their own magistrates and to be tried according to their own laws. In the treaty of 1230 between Frederick II, the king of Sicily, and Abbuissac, a Sarazin prince,⁸ it was stipulated that a Mohammedan judge should be appointed to render justice to the Moslems residing in the island of Corsica.⁹

At the hands of the Arabs, Egypt became a prosperous trading center.¹⁰ The geographical position

⁶ Chinese authors make mention of Arab settlements existing in Canton as early as 758 A.D. (Cf. Reinaud, *Relation des voyages faits par les arabes et les persans dans l'Inde et à la Chine dans le IX^e siècle de l'ère Chrétienne*, Paris, 1845, pp. cix ff.)

⁷ Travers Twiss, "Consular Jurisdiction in the Levant and the Status of Foreigners in the Ottoman Law Courts," p. 6; also, Du Moiron, G., *Les juridictions Françaises en orient et les tribunaux internationaux on Egypte*, p. 15.

It is questioned by some writers whether the system of jurisdiction under which the Arabs lived in Kaufu was properly characterized as extraterritoriality. It is maintained that the Arab magistrate was appointed by the Chinese authorities, and considerable Chinese law was applied, certainly where Chinese subjects were in any way involved. (See E. T. Williams, *China Yesterday and To-day*, N. Y., 1923, pp. 342-343.)

⁸ The text (in Latin) is found in J. Du Mont, *Corps universel diplomatique du droit des gens*, part 1, I, 168.

⁹ Warden, *On the Origin, Nature, Progress and Influence of Consular Establishments*, p. 56; also, De Martens, *Le guide diplomatique*, Paris, 1837, I, 229, n. 1.

¹⁰ "The Arabs in the days of their greatness," says Dicey, "were born traders as well as conquerors." (*The Nineteenth Century and After*, July, 1906, LX, 18.)

of the region rendered it a highway, so to speak, through which the riches of the East reached the European countries. The sea-power of the Arabs, however, was insignificant as compared with that of the Christian traders of the Mediterranean basin. It became necessary, therefore, for the former to enter into international relations with Europe in order to avail themselves of maritime commerce, thus facilitating the development of their trade.

The most influential among the European states in commercial intercourse at that time were the Italian republics. As early as the ninth century, relates Sir Travers Twiss, the Caliphs of Egypt granted the merchants of Amalphi the privilege of trading at Alexandria and to reside there under an Amalphitan consul.¹¹

In 1153 the Caliph of Egypt entered into a convention with Pisa by which certain trading privileges were granted to the Pisan merchants engaged in trade in his dominions.¹²

The Genoese followed, acquiring capitulatory privileges from Helam-el-Maleh (1205), and the Venetians were given similar privileges by Malek-el-Adel (1238). In 1488 Florence, under Laurent the Magnificent, obtained from Abu-Nasr, another ruler of Egypt, extended capitulations.¹³

¹¹ Twiss, *The Law of Nations*, 2d ed., I, 446.

¹² *The Nineteenth Century and After*, July, 1906, LX, 18.

¹³ Piétri, *Étude critique sur la fiction d'exterritorialité*, p. 292.

In 1507 the French and the Catalans conjointly obtained capitulatory privileges from Kan-Sou, one of the Mamelooks of Egypt.¹⁴

Tunis was another Mohammedan country which as early as the thirteenth century granted extritorial privileges to foreigners. By the treaty of 1230 with the king of Tunis, the Pisans acquired the right of establishing a factory in Tunis and other privileges in that town.¹⁵ The same rights were later granted to the Genoese.¹⁶ Thus, we can hardly overestimate the influence of this tolerated practice on the successors of the Arabian dynasties.¹⁷

NON-MOSLEM COMMUNITIES IN THE OTTOMAN EMPIRE

On his victorious entry to Constantinople on May 29, 1453, Mohammed II, following the example

¹⁴ Ibid., p. 293.

¹⁵ This was followed by another treaty dated August 11, 1265, by which Elmir-Mommini-Buabi, the ruler of Tunis, granted several extritorial privileges to the Pisans trading in his dominions. (The text of this treaty [in Latin] is given in J. Du Mont, *Corps universel diplomatique du droit des gens*, Supplement, part 1, II, 115-117.)

¹⁶ Warden, *On the Origin, Nature, Progress, and Influence of Consular Establishments*, p. 56.

Pradier-Fodéré seems to remark that the first treaty of international character and of historical import concluded between a Mohammedan government and a Christian power is that of November 21, 1270, between Philip III, king of France, and the king of Tunis. (*R. D. I. L. C.*, 1869, I, 120.) For the text of the treaty, see Famin, C., *Histoire de la rivalité et du protectorat des églises Chrétiennes en orient*, pp. 469-474; also, Rouard de Card, *Traité de la France avec les pays de l'Afrique du Nord*, Paris, 1906, pp. 109-113. The treaty was also signed by the king of Sicily and the king of Navarre.

¹⁷ In his article, "La juridiction consulaire dans les pays de l'orient et spécialement au Japon," Sir Travers Twiss emphasizes the influence of the Arabs on the development of the extritorial system as follows: "Les faits historiques nous font croire que c'est aux arabes

of the Arabs, ordered the Greeks to return to Constantinople and promised them freedom of worship and the preservation of their property. The Greek Patriarchate was vacant for two years when the city fell; but Mohammed the Conqueror sent for the Greek notables and addressed them as follows:

It is none of my business whom you choose for your Patriarch. Elect any one who suits you and consecrate him according to your ancient usages. But this vacancy is intolerable and I do not countenance it. Get down to work at once. Your man will have my backing but delay and I shall have your heads.¹⁸

Consequently, the synod chose the monk George Scholarius (Gennadius) to be crowned with the "tiara." In his assistance at the investiture, the Sultan addressed the Patriarch, saying: "Be the Patriarch and may Heaven protect you. Enjoy all the rights and privileges that your predecessors have enjoyed before you."¹⁹ The Patriarch was given the title of "Millet Bashi," or head of the nation.²⁰

qu'on doit attribuer l'initiative de cette méthode de renouer le commerce entre l'occident et l'extrême orient, après la dissolution de l'empire romain, et que les villes maritimes de l'Italie ont suivi l'initiative des Arabes en établissant, par voie d'accords avec les princes musulmans, des tribunaux de consuls-juges dans tous les grands entrepôts du Levant." (*R. D. I. L. C.*, 1893, XXV, 217.)

Expressing the same opinion, Mr. G. F. Abbott said: "It was not a Turkish, but a Mohammedan policy—a policy dictated by the precepts of the Prophet and hallowed by his example." (*Turkey in Transition*, London, 1909, p. 71.)

¹⁸ *American Bar Association Journal*, XI, 485.

¹⁹ Williams, *The Historians' History of the World*, New York, 1904, XXIV, 329.

²⁰ The word "millet" which means *nation* was later replaced by "djemaat" meaning *community*. (Brown, *Foreigners in Turkey*,

Two days later, the Armenian Bishop of Brousa, Joachim, was ordered to take up his official residence at Constantinople and to bring with him 200 Armenian families. At the same time, the head of the Jewish community was recognized.

The prerogatives of the Œcumenical Patriarch were defined in the Hatti-Sherif ²¹ promulgated at the time of his investiture. Judicial power was granted which made the Patriarch's tribunal competent to decide criminal cases as well as "all civil and correctional causes such as actions at law between two or more Greeks, and cases affecting marriage, divorces, legacies and testaments."²² Among other immunities was the exemption from the land tax (kharadj) which was extended to the members of the synod as well as the Patriarch.²³

Prerogatives of similar nature, though not as extensive as those conferred upon the Greek Œcumenical Patriarch, were conferred upon the Armenian

p. 18.) The Patriarch had also been given the Turkish title "Rutbetlu" which is translated in official correspondence as "His Holiness." (Young, *Corps de droit ottoman*, part 1, II, 2.) He was ranked as a vizier and possessed a janissary guard. (Williams, *op. cit.*, XXIV, 329; *Fortnightly Review*, October 15, 1866, VI, 609.)

²¹ The word "Hatti-Sherif" is equivalent to "imperial edict."

²² The Patriarch's tribunal, composed of the principal dignitaries of the clergy, could even pronounce the sentence of death, and the military authorities were responsible for the execution of its decrees. (For an account of the immunities of the Greek community and the juridical powers of the Œcumenical Church, see *The Juridical Review*, Edinburgh, III, 251 et seq.; also: Bertram, "The Orthodox Privileges in Turkey," *Journal of the Society of Comparative Legislation*, 1909, X, 126-140; Eliot, *Turkey in Europe*, ch. vi.)

²³ Williams, *The Historians' History of the World*, XXIV, 329.

Bishop and the Jewish Rabbi. Later, when the Turks found that there were many other non-Moslem communities in the Empire, all these religious sects were constituted autonomous bodies.²⁴

THE ITALIAN CAPITULATIONS

A few days after his victory over the city of Constantine, the Sultan, in an imperial rescript in the form of a letter of privileges, guaranteed to the Genoese in Constantinople freedom of worship and travel, preservation of the churches and property, and application of national jurisdiction on Turkish

²⁴ See *infra*, p. 89, n. 2.

It is to be noted that some authors maintain that by granting these concessions, the Turks were motivated by an economic interest expecting to receive a financial return from the non-Moslem communities in the Empire. Sir Valentine Chirol, for instance, remarks that "it was the interests of the ruling race to conserve the Christian communities as hewers of wood and drawers of water. There was a limit under the Sacred Law to the taxation, which could be imposed upon the Sultan's Mohammedan subjects; there was none to the taxation of his Christian subjects." (*The Occident and the Orient*, Chicago, 1924, p. 34.) Speaking of the Turkish grants of privileges, A. D. F. Hamlin asserts that "they were concessions made from a purely selfish motive—that of supplying the new empire with the commercial advantages and industries which the war-like conquerors were themselves incapable of maintaining." (*The Forum*, July, 1897, XXIII, 524; see also, *Law Magazine and Review*, New series, October, 1873, II, 864.) The question whether the capitulatory privileges were granted from a selfish motive, from a disposition towards toleration, or by influence of precedents can be safely answered by stating that all these worked together in guiding the Turk towards the policy of adopting the capitulatory system, although the influence of precedents can hardly be denied the highest credit.

soil, thus confirming the former privileges given them by the Greek emperors.²⁵ The rescript confirmed also the privileges previously granted by the Turks to the Genoese in Adrianople, but it prohibited the use of bells and forbade the building of new churches. Exemptions from certain services, then imposed on Ottomans, were also conceded.²⁶ These privileges were later confirmed in the treaties of 1612²⁷ and of 1665.²⁸

On April 15, 1454, capitulatory privileges were conferred upon the Venetians in confirmation of the capitulations granted under the former treaty concluded in Adrianople.²⁹ These were later confirmed by the same Sultan on January 26, 1479, on July 14, 1480, and in 1481;³⁰ and they were again renewed by the succeeding Sultans in 1482, in 1502, in 1517, in 1539, in 1540, in 1567, and in 1595.³¹

²⁵ "Et en signe d'amitié, ils m'ont présenté les clefs de leur ville, et se sont fait ainsi nos sujets; nous les avons donc acceptés en cette condition, et ils pourront vivre, se régir et se gouverner comme ils l'ont fait par le passé, sans que je puisse aller, avec mon armée, occuper ou ruiner leur ville." (Belin, *Histoire de la latinité de Constantinople*, 2d. ed., Paris, 1894, pp. 160-161.)

²⁶ Miltiz, *Manuel des consuls*, livre 2, part 1, II, ch. i, pp. 114-117, sec. 3.

²⁷ For text, see Noradounghian, *Recueil d'actes internationaux de l'Empire Ottoman*, I, 111-112.

²⁸ For text, cf. *ibid.*, I, 125-132.

²⁹ For text, see Ravndal, "The Origin of the Capitulations and of the Consular Institution," p. 92. See *supra*, p. 16, n. 2.

³⁰ Van Dyck, "Report on the Capitulations of the Ottoman Empire," *S. Ex. Doc.* 3, 47th Cong., special sess., p. 15.

³¹ Miltiz, *Manuel des consuls*, part 1, II, 73-77. The texts of the treaties of October 2, 1540, and of June 24, 1567, are found in J. Du Mont, *Corps universel diplomatique*, part 2, IV, 197-200, and part 1, V, 140 respectively.

In 1460, the Florentines were granted the privilege of trading in the Ottoman Empire. According to the terms of the capitulation Florence was to be allowed to maintain consulates in Turkey, and nationals of Florence were to enjoy in Turkey freedom of trade and security of life and property. Judicial cases between Florentines were to be decided by Florentine consuls.³²

THE FRENCH CAPITULATIONS

After the Italian city states, France was next to ask for the confirmation of the privileges formerly granted to the French by the rulers of Egypt.³³ Shortly after the conquest of Egypt by the Turks,³⁴ Sultan Selim I confirmed these adding thereto new notable concessions, and, at the request of the French merchants, then residing at Alexandria, Sultan Suleiman I³⁵ the successor to the throne, renewed in 1528³⁶ the capitulations granted by his father.³⁷

³² Miltiz, op. cit., livre 2, part 1, II, ch. ii, pp. 144 et seq., sec. 3.

³³ See p. 48, supra. The French are recorded to have obtained a decree from Bayazet II (1484-1512) giving them freedom to trade in the Ottoman Empire. (Lawrence, *Commentaire sur les éléments du droit international*, etc., IV, 120.)

³⁴ Egypt was conquered by the Turks in 1516.

³⁵ Suleiman I is said to have been the son of a French woman. (Young, *Constantinople*, p. 188.)

³⁶ Miltiz, op. cit., part 1, II, 207-209. For the text of the capitulation of 1528, see Ancien Diplomate, *Le régime des capitulations*, pp. 49-54; also: Testa, *Recueil des traités de la Porte Ottomane*, I, pp. 23-26; De Saint-Priest, *Mémoires sur l'ambassade de France en Turquie*, pp. 345-353; Charrière, *Négociations de la France dans le Levant*, I, 122-129.

In connection with the confirmation of the French privileges, the

These were followed by another elaborate document, the treaty of February, 1535,³⁸ which constitutes the basis on which the capitulatory régime has

French Monarch, in a letter to Suleiman I, asked for the redemption to the Christians of Jerusalem an old church which had been transformed into a mosque. Suleiman's reply throws light on the early friendly relations between the Turkish Sultan and the French King. Expressing his regret for the impossibility of satisfying the request, Sultan Suleiman said: "L'amitié et l'affection qui existent entre ma glorieuse majesté et vous rendent vos désirs admissibles auprès de ma personne, source de bonheur; mais cette affaire ne ressemble pas à toute autre affaire de domaine et de propriété, elle concerne notre religion. . . . Il est contraire à notre religion qu'un lieu qui porte le nom de mosquée et dans lequel se fait la prière soit maintenant altéré par un changement de destination." The Sultan, however, expressly guaranteed the protection of all other places occupied by the Christians and assured the safety of the occupants. (The text of the Sultan's letter in French and Turkish is found in Charrière, *Négociations de la France dans le Levant*, I, 129-132.)

³⁷ This capitulation is of great importance in that it served as a basis for the privileges later conferred on the French in the Levant. It is to be noted, however, that the document did not make mention of the king of France; it was directly concluded with the consul, Jehan Benoist de Pierre Benoist, who was consul of both the French and the Catalans residing in Egypt. The privileges under the capitulation were therefore *ipso facto* enjoyed by the members of both communities.

³⁸ Hammer maintains that the treaty could never have been concluded in February, 1535 in Constantinople, because of the historical record that the Sultan and the Grand Vizier were then on their Persian campaign stationed in their winter quarter at Bagdad. According to him, they both arrived at Constantinople, Saturday, January 8, 1536. He, therefore, presumes that the treaty must have been made in February, 1536 (see *Journal asiatique*, 1827, X, 20, 39). Charrière, however, calls attention to the old style calendar under which the year begins in March and the date of the year for the first three months is that of the preceding year. Commenting on Hammer's view, Charrière adds: "Mais le savant historien commet ici une erreur qui étonne de sa part sur un point aussi élémentaire en histoire, et la connaissance de cette méprise rend superflue toute

developed; ³⁹ it is the first capitulation in the form of a treaty of amity and commerce.⁴⁰

The second French capitulation of October 18, 1569, granted for the first time in the history of the

sa démonstration, quelque instructive qu'elle reste encore. Il a oublié que tous les actes de l'histoire de France avant la Réforme du calendrier étendent ainsi la date de l'année précédente sur les trois premiers mois de la suivante par l'ancienne manière de commencer l'année à Pâques." (*Négociations de la France dans le Levant*, I, p. 284, n.)

³⁹ See *infra*, p. 69. Also, Appendix I.

Unlike the capitulation of 1528, the treaty of 1535 is this time concluded between the French King and the Turkish Sultan.

⁴⁰ The rivalry between Charles V of Austria and Francis I of France furnishes the explanation of the motives which led to the conclusion of this treaty. As a result of the wars between the two sovereigns, Francis was defeated and led captive into Spain. To gain his liberty, Francis signed a disastrous treaty at Madrid in 1526, which he later declared null and void. He recommenced war with Italy, but finally consented to a definite arrangement whereby he renounced his claim to Italy. The war between Austria and Turkey, on the other hand, naturally developed a community of interest between Turkey and France strong enough to cause the Most Christian King to unite with the Mohammedan Sovereign. A mission is said to have been sent by Francis as early as 1525 to open negotiations with the Porte, but it failed to reach its destination. The envoy with twelve men accompanying him were assassinated on their way to Constantinople. (See Charrière, *op. cit.*, I, 112 ff.) A second mission was sent during the captivity of Francis (1526) headed by a certain Jean Frangipani, a Hungarian (according to R. Davey, Frangipani was an Italian by birth and was sent to Turkey in 1521. On this point, see *ibid.*, p. 117, n). This mission was secret and the reason for choosing a foreigner to represent France before the Porte was to facilitate the denial that such a mission had existed in case it became known to the public (see text of the letter of Francis to the Sultan, *ibid.*, pp. 119-121). The mission met with success and in reply to the French appeal for aid, the Moslem Sovereign wrote: "Toi qui es François, roy du pays de France, vous avez envoyé une lettre à ma Porte, asile des souverains, par votre

Ottoman Empire the permission to fly the French flag on foreign ships navigating in the Levant belonging to nations which did not have treaty relations with Turkey, that is, all foreign ships belonging to nations who did not have capitulatory privileges

fidèle agent Frankipan, vous lui avez aussi recommandé quelques communications verbales; vous avez fait savoir que l'ennemi s'est emparé de votre pays, et que vous êtes actuellement en prison, et vous avez demandé ici aide et secours pour votre délivrance. Tout ce que vous avez dit ayant été exposé au pied de mon trône, refuge du monde, ma science impériale l'a embrassé en détail, et j'en ai pris une connaissance complète. Il n'est pas étonnant que des empereurs soient défaits et deviennent prisonniers. Prenez donc courage, et ne vous laissez pas abattre. . . . Du reste, en interrogeant votre susdit agent sur les affaires et les nouvelles, vous en serez informé." (Ibid., pp. 116-119.) Encouraged by the success of this mission, Francis sent this time an official mission to Constantinople in 1534. Jean de Laforest was chosen as ambassador and was given letters of credence with official instructions. The negotiations resulted in the conclusion of the treaty of 1535 signed by Forest in the name of the king of France and by the Grand Vizier in the name of the Sultan. It is of interest to note that the instructions as given to the French ambassador bore no guidance for the negotiation of privileges to French subjects in Turkey; Forest was instructed to negotiate a loan and to ask for the dispatch of an Ottoman fleet to the Neapolitan waters. The privileges granted to the French in the Treaty seem to have been granted by the Sultan without being asked for. (For the text of the instructions given to Forest, see *ibid.*, pp. 255-263.)

For an account of the early diplomatic relations between France and Turkey, see: Ancien Diplomate, *Le régime des capitulations*, pp. 55-69; Bourilly, V.-L., "L'ambassade de la Forest et de Marillac à Constantinople (1535-1538)," *Revue historique*, May-Aug., 1901, LXXVI, 297-328; Maron, *François 1er et Soliman le Grand*, 1853; Rey, F., *La protection diplomatique et consulaire dans les échelles du Levant et de Barbarie*, pp. 116-121; Péliissié du Rausas, *Le régime des capitulations dans l'Empire Ottoman*, I, pp. 4 et seq.; Shotwell, "A Short History of the Question of Constantinople and the Straits," *International Conciliation*, Pamphlet No. 180, November, 1922, p. 480.

No Turkish representative had been sent to France until 1569.

were allowed to navigate under French protection. This treaty also abolished the provision of article XV of the previous treaty of 1535 limiting the exemption from taxation to a period of ten years.⁴¹

The third French capitulatory treaty was concluded in July, 1581, between Sultan Murad III and Henry III. It confirmed the former privileges and by its terms France was made the only country privileged to use her flag on foreign vessels.⁴² Thus France became the legitimate protector, in this early period, of most of the foreign traders in the Ottoman Empire with little regard to nationality. This explains how the merchants of the various nationalities of Europe came to be indiscriminately classed under the appellation of Franks by the Turks.⁴³

(A list with dates of the ambassadors sent by each of the two countries to the other up to the end of the nineteenth century is given in Hammer, *Histoire de l'Empire Ottoman*, XVII, 140, 160.) According to Charrière, as early as 1530, Sultan Suleiman was inclined towards sending an envoy to France, but for several reasons his desire was not put into effect. (Charrière, *Négociations de la France dans le Levant*, I, 242, n. 1.)

⁴¹ For text, see: Ancien Diplomate, *Le régime des capitulations*, pp. 73-80; Testa, *Recueil des traités de la Porte Ottomane*, I, 91-96; Noradounghian, *Recueil d'actes internationaux de l'Empire Ottoman*, I, 88-93.

⁴² For text, cf. Ancien Diplomate, *op. cit.*, pp. 85-92.

⁴³ "After the treaty of 1535," says Judge Davis, "the French took under their protection persons of other nationalities not represented by consuls and hence the generic name of "Franks" was given to all participants in the privileges, and has been preserved in the laws, treaties, and public documents of the United States." (Dainese v. The United States, 1880, 15 Ct. Cl., 64.) Sir Travers Twiss is of the opinion, however, that the appellation of "Franks" dates back to 1023 A. D. when the term was used in an ordinance of Sultan Mou-

These capitulations were renewed occasionally on the accession of new sultans. The fourth and fifth French capitulations were those obtained by Henry IV from Sultan Mohammed III in February, 1597, and from Ahmed I on May 20, 1604.⁴⁴ Again in these treaties, Henry IV obtained the former privilege of protecting the trade of other European nations.⁴⁵ The sixth capitulation was that of June 5, 1673, between Louis XV and Mohammed IV.⁴⁶

The seventh, that of May 28, 1740, between

zaffer ("Consular Jurisdiction in the Levant and the Status of Foreigners in the Ottoman Law Courts," p. 8). See also, Du Moiron, G., *Les juridictions Françaises en orient et les tribunaux internationaux en Égypte*, p. 13.

Martens remarks that the term "Franks," *Farang*, did not apply to the Russians. (F. de Martens, *Traité de droit international*, Paris, 1886, II, 173.)

⁴⁴ For the texts of the two treaties with comments, see Ancien Diplomate, op. cit., pp. 95-121; the text of the treaty of May 20, 1604, is also found in Noradounghian, op. cit., I, 93-102; Testa, op. cit., I, 141-151; J. Du Mont, *Corps diplomatique*, part 2, V, 39-42; De Saint-Priest, *Mémoires sur l'ambassade de France en Turquie*, pp. 415-430.

⁴⁵ By a special decree, dated April 20, 1607, this privilege was emphatically confirmed: "We command this: that from this day all foreign nations having no ambassador at our Sublime Porte and coming to trade in our Empire shall come under the protection of the French flag in accordance with ancient usage, and shall render obedience to the French consuls and ambassador; and that the capitulations and orders obtained by the English in this matter, which will be found to be contradictory to our sublime capitulation, shall in no way be observed in the places of our Empire." (For text, see Noradounghian, op. cit., I, 108-110; also, De Testa, op. cit., I, 152-154.)

⁴⁶ For text, see Ancien Diplomate, op. cit., pp. 129-140; Noradounghian, op. cit., I, 136-145.

Louis XV and Sultan Mahmoud I,⁴⁷ exceeds the preceding capitulations in importance, in that it binds the successors of the Sultan to observe it. It is furthermore the most specific and the first one in which the Sultan calls the king of France his friend.⁴⁸

FRENCH LEGISLATIVE ACTS

The principal legislative acts for the control of the French consular jurisdiction in the Levant are those of August, 1681,⁴⁹ of July 6, 1749,⁵⁰ of June, 1778,⁵¹ of March 3, 1781,⁵² and of May 28, 1836.⁵³ Of these, the royal edict of June, 1778, is the fundamental law in respect to civil jurisdiction, while the law of May 28, 1836, is the fundamental law in respect to criminal jurisdiction, both, however, resting upon the provisions of the ordinance of August, 1681.

⁴⁷ For text, vide: Ancien Diplomate, op. cit., pp. 151-182; Testa, op. cit., I, 186-210; Noradounghian, op. cit., I, 277-306; De Saint-Priest, op. cit., pp. 475-522; Gavillot, J. C. A., *Essai sur les droits des Européens en Turquie et en Égypte*, pp. 27-99; St. Pap., vol. C, 1906-1907, pp. 730-754.

⁴⁸ This was confirmed by the treaty of peace of June 25, 1802, (De Saint Priest, op. cit., pp. 523-527), and later by the treaties of commerce of November 25, 1838, and of April 29, 1861. The texts of the latter two treaties are found in Gavillot, J. C. A., op. cit., pp. 100-113.

⁴⁹ De Clercq and de Vallat, *Formulaire des chancelleries diplomatiques et consulaires*, ed. 6, 1890, Tome II, p. 1.

⁵⁰ Ibid., II, 3.

⁵¹ Ibid., II, 4-10.

⁵² Ibid., II, 10-24. This ordinance was supplemented by instructions dated May 6, 1781. See *ibid.*, pp. 24-31.

⁵³ Ibid., II, 141. This law was followed by a circular, dated July 5, 1836, providing for the execution of the law. See *ibid.*, II, 153-159.

THE BRITISH CAPITULATIONS

After the French, the English were next to secure capitulatory privileges in the Ottoman Empire.⁵⁴ The first so-called "Charter of Privileges" was secured by the British in 1579; this was later confirmed in 1583, renewed in 1606, and modified in September, 1675.⁵⁵ The treaty of peace of January 5, 1809,⁵⁶ confirming the capitulation of 1675,⁵⁷ is of particular importance in that it is the first treaty by which England undertook to conform herself to the rule of the Ottoman Porte that vessels of war should not enter the canal of Constantinople.⁵⁸ It is also the

⁵⁴ The first British ambassador to Turkey was Edward Burton sent to Constantinople in 1593 (Hammer, J. de, *Histoire de l'Empire Ottoman*, XVII, 134). Sir Edwin Pears, however, makes mention of William Harborne as the first English ambassador to the Sultan arriving at Constantinople in 1583 (Pears, *Turkey and its People*, p. 338). The first Turkish delegate to England was Houssein-Tschaousch who was sent to London in 1619 to notify the king of England of the accession of Sultan Osman II (Hammer, op. cit., XVII, 158).

⁵⁵ The last capitulation of September, 1675, covers all the provisions of the previous charters. For text, see Noradounghian, op. cit., I, 146-169. For English version, see Farley, J. L., *Turkey*, London, 1866, pp. 291-316; also, Hertslet, *Commercial Treaties*, II, 346-369.

⁵⁶ For text, see: Noradounghian, op. cit., II, 81-84; Farley, *Turkey*, pp. 317-320; De Martens, *Nouveau recueil de traités*, I, 160-163; Hertslet, op. cit., II, 371-377. This treaty was followed by the commercial treaties of August 16, 1838 (Hertslet, op. cit., V, 506-535), and of April 29, 1861 (Noradounghian, op. cit., III, 136-144 or Hertslet, op. cit., XI, 561-568).

⁵⁷ See article IV, Hertslet, op. cit., II, p. 375.

⁵⁸ The question of the Straits has been one of the most grievous factors throughout the history of the Near Eastern problem. In 1475 the Turks obtained control of the shores of the Black Sea thus acquiring a monopoly in the Black Sea excluding all foreign shipping.

With few exceptions, the Straits were closed to all ships that did not fly the Turkish flag, and despite the fact that Turkey granted in the European capitulations freedom of trade in the Ottoman Empire, the presumption was that the Black Sea was not included. This monopoly was maintained so long as the Black Sea remained an "Ottoman Lake," but the situation changed when Russia first turned her attention to the Black Sea for an outlet and succeeded in acquiring in 1700 the fort of Azof with its neighboring territory (see art. IV of the treaty of peace of June 13, 1700, Noradounghian, op. cit., I, 197-203). Fearing the effects of a rival in the Mediterranean, France was the first of the European powers to resent Russian designs in the Black Sea; consequently, Russia surrendered in 1711 her former conquest (see Treaty of Pruth of July 21, 1711, arts. I, II, in Dumont, *Corps universel diplomatique du droit des gens*, part 1, VIII, 275), and furthermore recognized in 1739 the Turkish monopoly, pledging to refrain from building a fleet in the Black Sea (art. IX of the Treaty of Belgrade of September 18, 1739, Noradounghian, op. cit., I, 258-267). Russian attempts for free passage through the Straits were, however, renewed and finally triumphant Russia obtained in 1774 the so-coveted freedom of passage to Russian merchant ships through the Straits between the Black Sea and the Mediterranean (cf. art. XI of the Treaty of Kutchuk Kainarji of July 21, 1774, Holland, T. E., *The Treaty Relations of Russia and Turkey*, London, 1877, pp. 36-55).

This concession, reluctantly granted by defeated Turkey, marked the beginning of a new era in the history of the Straits. The old principle excluding all foreign ships from the Black Sea now broken, the Western Powers demanded and obtained the privileges conferred upon Russia. Austria secured them in 1784 (Martens, *Nouveau recueil général de traités, conventions, etc.*, XV, 462-463 or Noradounghian, op. cit., I, 379-382), England in 1799 (Hertslet, *Commercial Treaties*, V, 499-501; *ibid.*, VII, 1021), France in 1802 (art. II of the Treaty of Peace of June 25, 1802, Martens, *Recueil des principaux traités d'alliance, de paix, etc.*, 2d. ed., VII, 416-418), and Prussia in 1806 (*ibid.*, VIII, p. 467). But the event of the loss of Turkish commercial monopoly in the Black Sea and the Straits did not impair the Ottoman right to prohibit warships from passing through the Straits. By the peace of the Dardanelles of January 5, 1809, England recognized this "ancient rule of the Empire" and promised to conform thereto (see art. XI of the treaty of peace of January 5, 1809, *supra*, p. 60, n. 56. In the meantime, Russia was taking advan-

tage of the weakness of Turkey, enlarging her concessions but simultaneously arousing European protests (see Convention of Oct. 7, 1826, art. VII, Hertslet, *The Map of Europe by Treaty*, I, 747-753; the Treaty of Adrianople of September 14, 1829, art. VII, *ibid.*, II, 813-823; and especially the Treaty of Unkiar-Skelessi of July 8, 1833, secret clause, *ibid.*, II, 925-928). As a result of the pressure of the European protests, a collective agreement was concluded in 1840 between Russia, Austria, Prussia, Great Britain, and Turkey by which Turkish sovereignty over the Straits was guaranteed and "the ancient rule of the Ottoman Empire, in virtue of which it has in all times been prohibited for ships of war of foreign Powers to enter the Straits of the Dardanelles and of the Bosphorus," was recognized (see Treaty of July 15, 1840, arts. III, IV, *ibid.*, II, 1008-1012). From that date, the closing of the Straits to foreign warships in time of peace became a part of European public law. The Convention of 1841 between Great Britain, Austria, France, Prussia, Russia, and Turkey confirmed the principle, (see Convention of July 13, 1841, arts. I, II, *ibid.*, II, 1024-1026), which was later accepted by the other powers and confirmed in the treaty of Paris of March 30, 1856, (see convention annexed to the general treaty, art. I, *ibid.*, II, 1266-1269), and in the Conference of London of 1871 (art. II of the Treaty of London of March 13, 1871, *ibid.*, III, 1919-1923). The principle confirmed in these conventions remained a fundamental rule of the international law of the Straits down to the World War.

An excellent short historical account of the question of the Straits is found in Shotwell, J. T., "A Short History of the Question of Constantinople and the Straits," *International Conciliation*, pamphlet No. 180, November, 1922. For other references, see: Adair, R., *The Negotiations for the Peace of the Dardanelles in 1808-9*, London, 1845; Buxton, N. E., and Phillipson, C., *The Question of the Bosphorus and the Dardanelles*, London, 1917; Callwell, C. E., *The Dardanelles*, Boston, 1919; Cambon, H., "La question des détroits au XIXe siècle," *Annales des sciences politiques*, 1909, XXIV, 172; Dascovici, N., *La question du Bosphore et des Dardanelles*, Genève, 1915; Driault, E., *La question d'Orient*, Paris, 1905; Goriainow, S. M., *Le Bosphore et les Dardanelles*, Paris, 1910; Hyde, C. C., *International Law chiefly as interpreted and Applied by the United States*, Boston, 1922, I, 280-281; Jabotinsky, V., *Turkey and the War*, London, 1917, ch. xi; Lozé, M., *La question des détroits*, Paris, 1908; Macey, P., *Statut international des "Détroits"*, Paris, 1912; Mishev, P. H., *La Mer Noire et les Détroits de Constantinople*, Paris, 1899; Robinson, *The Straits of Dardanelles*, London, 1878;

first treaty by which the king of England is described by the title of " His Majesty " or *Padishah*.⁵⁹

BRITISH LEGISLATIVE ACTS

The first English Foreign Jurisdiction Act to set forth the fundamental propositions of law concerning British consular jurisdiction in the Ottoman Empire was that of August 24, 1843.⁶⁰ The application of this general parliamentary act was effected through several enactments, significant among which

Snow, F., *International Law*, 2d ed., Wash. Printing Office, 1898, p. 18; *United States and Turkey*, McGill and Witherow, Wash., D. C., 1868, pp. 3-17. On the period after the outbreak of the World War and the settlement of Lausanne, see *infra*, p. 242, n. 29.

⁵⁹ This title was given to Francis I in his correspondence with Sultan Suleiman I, and the succeeding French kings were likewise styled as such; all other western potentates were mere "beys" or "lords" in Turkish documents. (See W. S. Davis, *A Short History of the Near East*, N. Y., 1924, p. 227; also, G. F. Abbott, *Turkey, Greece and the Great Powers*, N. Y., 1917, p. 18.)

This shows to what extent French influence was predominant in the early period of the Ottoman Empire. That the French ambassador and consuls were to be given precedence over all other foreign representatives accredited to Turkey was emphatically expressed in the Franco-Turkish Treaty of May 28, 1740. (Articles XVII, XLIV, XVIII.)

It is also to be noted that it was not until 1825 that the British Crown began to appoint consuls in Turkey. Before that time, the so-called "Levant Company" appointed its consular agents, and it was only due to the extinction of the Company in 1825 that the jurisdiction of its consuls was transferred to the consuls appointed by the Crown. (The text of the British Parliamentary Act authorizing the transfer of the power and property of the Company to the Crown is found in *St. Pap.*, XII, 531-535; also, Hertslet, *Commercial Treaties*, IV, 484-489.)

⁶⁰ Hertslet, *op. cit.*, VI, 500-506, 840-841.

were those of 1873,⁶¹ 1874,⁶² 1876,⁶³ 1882,⁶⁴ 1890,⁶⁵ 1891,⁶⁶ 1895,⁶⁷ 1898,⁶⁸ and of 1899.⁶⁹

THE CAPITULATIONS OF OTHER WESTERN POWERS

The English capitulations were followed by those of the other western powers: Austria obtained capitulatory privileges by the treaty of May 1, 1615;⁷⁰ Holland by the treaty of September 15, 1680;⁷¹ Sweden by the treaty of January 10, 1737;⁷² Sicily by

⁶¹ *St. Pap.*, LXIII, 59-161.

⁶² *Ibid.*, LXV, 496-497.

⁶³ *Ibid.*, LXVII, 600-601.

⁶⁴ *Ibid.*, LXXXIII, 547-553.

⁶⁵ *Ibid.*, LXXXII, 1036-1037.

⁶⁶ *Ibid.*, LXXXIII, 102-112.

⁶⁷ *Ibid.*, LXXXVII, 642, 647.

⁶⁸ *Ibid.*, LXXXVIII, 178.

⁶⁹ *Ibid.*, XCI, 1045-1105. This order in council, dated August 8, 1899, was the one by which the previous orders in council and other provisions regulating the British consular jurisdiction in Turkey were repealed and consolidated. (The text is also found in Hertslet, *op. cit.*, XXI, 855-1062.)

⁷⁰ Noradounghian, *Recueil d'actes internationaux de l'Empire Ottoman*, I, 113-118. This was confirmed by the treaties of July 27, 1718, (*ibid.*, I, 220-227), and of February, 1784 (*ibid.*, I, 379-382).

⁷¹ *Ibid.*, I, 169-181; confirmed by the treaties of March 14, 1840, (*St. Pap.*, XXVIII, 391-395), and of February 25, 1862 (*Archives diplomatiques*, année 1870, tome II, pp. 644-653).

The Netherlands trading in Turkey remained, however, under either French or English protection until 1741, when by their own law, they were forbidden to seek the protection of any country other than Holland. (Hinckley, F., *American Consular Jurisdiction in the Orient*, p. 12, n. 1.)

⁷² Noradounghian, *op. cit.*, I, 239-242; confirmed by the treaty of January 31, 1840 (*St. Pap.*, XXVIII, 404-408 or Martens, *Nouveau recueil général de traités*, I, 1-6).

the treaty of April 7, 1740; ⁷³ Denmark by the treaty of October 14, 1746; ⁷⁴ Prussia by the treaty of March 23, 1761; ⁷⁵ Spain by the treaty of September 14, 1782; ⁷⁶ Russia by the treaty of June 10/21, 1783; ⁷⁷ Sardinia by the treaty of October 25, 1823; ⁷⁸ the United States by the treaty of May 7, 1830; ⁷⁹ Belgium by the treaty of August 3, 1838; ⁸⁰ the Hanse cities by the treaty of August 27, 1839; ⁸¹ Por-

⁷³ Noradounghian, op. cit., I, 270-277; confirmed by the treaty of March 5, 1851 (ibid., II, 394-403).

By the treaty of July 10, 1861, the Kingdom of Italy succeeded to the capitulatory privileges previously conferred by the Porte on the states which later formed the Kingdom of Italy (ibid., III, 151-159).

⁷⁴ Ibid., I, 308-314; confirmed by the treaties of May 1, 1841, (ibid., II, 330, 383), and of March 13, 1862 (*Archives diplomatiques*, 1870, II, 653-660).

⁷⁵ Noradounghian, op. cit., I, 315-319; confirmed by the treaty of March 20, 1862, (*Archives diplomatiques* année 1870, tome II, 660-666 or Noradounghian, III, 185-191), passing to the German Empire in 1870.

⁷⁶ Noradounghian, op. cit., I, 344-349; confirmed by the treaty of March 2, 1840 (Martens, *Nouveau recueil général de traités*, I, 22-26).

⁷⁷ Noradounghian, op. cit., I, 351-373; confirmed by the treaty of April 18/30, 1846 (ibid., II, 371-379).

⁷⁸ Ibid., II, 99-102; confirmed by the treaties of September 2, 1839, (ibid., II, 283-287 or *St. Pap.*, XXVIII, 395-399), and of July 31, 1854, (Noradounghian, op. cit., II, 425-431), passing to Italy in 1861.

⁷⁹ Malloy, II, 1318-20; confirmed by the treaty of Feb. 25, 1862 (ibid., II, 1321-41). See *infra*, p. 130.

⁸⁰ Noradounghian, op. cit., II, 243-248 or *St. Pap.*, XXVI, 1222-27; confirmed by the treaties of Aug. 3, 1839, (Noradounghian, II, 276-282), of April 30, 1840, (ibid., II, 302-303 or *St. Pap.*, XXVIII, 385-389), and of October 10, 1861 (*Archives diplomatiques*, 1864, tome IV, pp. 169-176).

⁸¹ *St. Pap.*, XXVIII, 448-454; confirmed by the treaties of Sept. 1, 1841, (Martens, op. cit., II, 183-189), and of Sept. 27, 1862 (Noradounghian, III, 206).

tugal by the treaty of March 20, 1843; ⁸² Greece by the treaty of May 23, 1855; ⁸³ Brazil by the treaty of February 5, 1858; ⁸⁴ and Bavaria by the treaty of August 25, 1870. ⁸⁵

THE MOST-FAVORED-NATION CLAUSE

The capitulations granted to these countries and later to others were more or less identical. The most-favored-nation clause was inserted in all, thus forming of the capitulatory system a code of privileges (written and unwritten) more or less uniform in its application to foreigners in Turkey and in the maintenance of which, the nations enjoying capitulatory rights became, to a certain extent, jointly concerned. ⁸⁶

⁸² Noradounghian, II, 354-360.

⁸³ Ibid., II, 437-444.

⁸⁴ *St. Pap.*, XLVIII, 1045-1048.

⁸⁵ Noradounghian, op. cit., III, 296-298.

⁸⁶ This is expressed in art. V of the treaty of Aug. 25, 1870, between Turkey and Bavaria (see above, n. 85), providing that "in the event that the Sublime Porte should undertake to come to an understanding with the other Powers with regard to the modification, in one sense or another, of the jurisdiction exercised by consuls in Turkey in virtue of the treaties and capitulations, the Government of Bavaria will not claim anything beyond the privileges and immunities which would be maintained in behalf of the consuls of the other Powers, to whom, moreover, the Bavarian consuls will continue to be assimilated in all respects."

There is much difference in attitudes on the question as to whether the most-favored-nation clause in commercial treaties applies likewise and automatically to jurisdictional rights, such as extraterritoriality. It is to be admitted, however, that in Turkey the clause applied in most cases to jurisdictional rights. (See S. K. Hornbeck, *The Most-favored-nation Clause in Commercial Treaties*, Madison, Wisconsin, 1910, extended bibliography, pp. 113-121.)

The capitulations in the early period were frequently renewed on the accession of new sultans, and fresh clauses were added; the principle upon which the system operated, however, remained unchanged.⁸⁷

⁸⁷ "Les capitulations sont aujourd'hui ce qu'elles étaient il y'a quatre siècles; elles n'ont été modifiées ni dans leur esprit ni dans leur texte." (Du Rausas, *Le régime des capitulations dans l'Empire Ottoman*, I, 22.)

CHAPTER IV

THE SYSTEM OF THE CAPITULATIONS

INTRODUCTORY

The question as to what the capitulations are is too complicated to be answered definitely and satisfactorily. "So great has been the accumulation of these capitulatory rights through the centuries," remarks Clair Price, "that it is to be doubted whether any one knows to-day precisely what the capitulations are."¹ Writers uniformly agree, however, that the French treaty of 1535 is the basis for all the succeeding capitulations and the most specific and elaborate of the preceding capitulatory arrangements.² The privileges granted therein are more or less similar to those conferred upon the Italian cities in the earlier capitulations.

¹ *Cur. Hist.*, June, 1922, XVI, 464.

"These (rights) are so numerous and of such uncertain origin," affirms Mr. Thayer, "that an inclusive enumeration is impossible. Perhaps they may be best summarized by saying that any act of an arbitrary nature on the part of a native official, which controverts a privilege of long standing, is considered *ultra vires*." (*A. J. I. L.*, 1923, XVII, 215.)

² "This general treaty of peace, amity, and commerce," says P. M. Brown, "may be considered as the real commencement of the régime of the capitulations whereby foreigners in Turkey have come to enjoy such extraordinary privileges. Certainly all subsequent treaties were closely modelled on this treaty; and other nations have claimed as favourable treatment as therein accorded to France." (*Foreigners in Turkey*, p. 33.) Confirming this opinion, Sir Edwin Pears asserts that the "system which was thus formulated in the French capitulations has not materially changed from that day to this." (*The Fall of Constantinople*, N. Y., 1886, p. 150.)

THE FRENCH TREATY OF 1535

Consisting of sixteen articles, this French capitulation³ deals mostly with such problems as freedom of trade, passage of vessels, slavery, piracy, protection of property, security of life, etc. Perhaps the most important articles are those concerned with judicial administration; these provide that all French citizens shall be tried by the French consul, and in no case, civil or criminal, between merchants or other subjects of the French King shall the Turkish authorities interfere; it is only when the consul finds it necessary, in case his orders are not obeyed, to appeal to Turkish authorities for the execution of these orders that the Turkish officials shall lend the necessary aid and the compulsory power. Civil cases between Turks and French nationals shall not be tried in Turkish courts without the presence of a dragoman.⁴ In criminal cases, the French subjects shall not be called or tried by the local courts, but the cases shall be referred to the Sublime Porte where the testimony of the French and the Turk shall be heard. The treaty provides also for freedom of worship and asserts that the subjects of the King (the French) shall not be considered "Mohammedans" unless they voluntarily and openly profess the change of their faith. The subjects of either country are to be granted in the territory of the

³ See *supra*, p. 54. For the text of the treaty, see Appendix I.

⁴ The dragoman is the official interpreter or the delegate of the foreign consulate or embassy.

other exemption from taxation or performance of any services, and French nationals residing in Turkey shall enjoy this exemption unless the period of residence shall have exceeded ten years. Finally, a proposition is inserted in the Treaty that the Pope, the King of England, and the King of Scotland shall be entitled to adhere to the Treaty, on condition that ratifications are exchanged not later than eight months from the date of the Treaty.⁵

Despite the fact that this treaty forms the background of the capitulatory system, the question as to what the capitulations are is by no means answered in a summary of its contents. Much has been added to this (written and unwritten). The system, therefore, can only be explained in a general way, and by doing so, we may discuss the capitulations under two main headings, namely, the economic and the juridical, although we may add the personal privileges such as freedom of worship, freedom of residence and trade, and inviolability of domicile.

PERSONAL PRIVILEGES

Freedom of worship has been uniformly granted in all the capitulations. Article VI of the French ca-

⁵ According to Sir Travers Twiss, clauses were found in the Turkish text providing for the use of the French flag by citizens of nations having no treaty of friendship with the Porte and for the guardianship of the holy places of Palestine. He remarks, however, that it is probable that these clauses did not belong to the treaty of 1535 but were later added on the renewal of the Treaty by the succeeding Sultan. (Twiss, T., *The Law of Nations*, I, 454.)

pitulation of 1535⁶ provides that all French subjects, their agents and servants shall have the right to practice their own religion. It is interesting to note, in this connection, that despite the Islamic prohibition of the use of liquor, the French residing in Turkey were allowed to import wine from outside or make it in their houses.⁷

The individual freedom of the foreigner is, furthermore, expressly promised in most of the capitulations. This was granted in the French capitulations of 1569, of 1581, of 1604, of 1673, and of 1740. The French were not to be molested under pretext that they injured the Turks or talked against the Islamic faith.

This individual freedom was extended to commerce and the exercise of professions. Article I of the French capitulation of 1535⁸ provides for freedom of trade and residence. The French were given freedom and safety and were allowed to navigate on their vessels with their belongings and men, to travel on land, and to reside in the Empire.⁹

The inviolability of the domicile of the foreigner

⁶ See Appendix I.

⁷ "Les consuls de France et ceux qui en dépendent comme religieux, marchands, et interprètes, pourront faire faire du vin dans leurs maisons et en faire venir du dehors pour leur provision ordinaire, sans qu'on puisse les inquiéter à ce sujet." (Article XL of the French treaty of 1740.)

⁸ See Appendix I.

⁹ The Hedjaz province containing the holy cities of Medina and Mecca was excepted.

was also recognized in most of the capitulations:¹⁰ Article LXX of the French treaty of 1740 stipulates that the Ottoman officials shall not enter by force a house occupied by a Frenchman; when an entry to such a house is required, the consul or the ambassador shall be notified and the persons appointed in their behalf shall go with the local officials to the place in question.¹¹ This unlimited inviolability was later restricted only to localities distant by nine hours or less from the residence of the consular agent.¹²

ECONOMIC PRIVILEGES

The economic capitulations consisted of exemptions from direct taxation, of regulation of customs duties, and of foreign supervision of the Ottoman financial system. Under the early capitulatory régime, foreigners were exempted from the "kharadj" or tax on land and from the "jizyah" or poll tax imposed on non-Moslems (Zimmis) residing in Moslem territory; foreigners were also exempted later from new taxes such as the "kassa-

¹⁰ See Dislere et de Mouy, *Droits et devoirs des Français dans les pays d'Orient et d'extrême orient*, p. 56.

¹¹ The origin of the inviolability of the domicile of the foreigner goes back to the early extraterritorial régime in Turkey when foreigners used to reside in their own quarters subject to their own jurisdiction and officials. When foreigners began to reside outside their quarters later, they were permitted to enjoy the same privileges that they had enjoyed in their quarters. The new residence, outside the quarters, was treated as if it were a part of the quarter assigned to the community. (See Du Rausas, *Le régime des capitulations*, I, 87.)

¹² See *infra*, p. 83, n. 39.

bieh " or slaughter fees, the " takelify urfieh " or arbitrary taxes, etc.¹³

Furthermore, the customs were regulated by the Western Powers, viz., Turkey could not raise the tariff rate on any commodity without the consent of the nations concerned.¹⁴ In 1907, however, the tariff on imports was raised from 8 per cent to 11 per cent ad valorem by the consent of the foreign powers,¹⁵

¹³ The origin of these exemptions goes back to the time when the main source of revenue was secured from religious obligations by means of taxes such as the tithes, the sheep tax, etc. Since these were Moslem taxes provided for in the Koran, the conclusion was drawn that non-Moslems should be exempted from them. The origin may also be traced back to the days when the non-Moslem communities were allowed to have their own quarters and to maintain therein their own administration, jurisdiction and police. These communities contributed to the maintenance of their public services and their relations with the local authorities were thus limited. They enjoyed none of the services of the state, and it was understandable, therefore, that this seclusion should exempt them from local taxes.

It is to be noted that this exemption of foreigners from direct taxation was not only discriminatory against Turkish nationals (Moslems and non-Moslems), but it gave the foreigners privileges that they could not enjoy in their own countries. Speaking of the exemption, G. F. Abbott remarked: "It was an arrangement which, scrupulously observed, guaranteed to foreign residents privileges and immunities not only incomparably greater than any known to the Sultan's Christian subjects, but even greater than those which Frenchmen, Englishmen, and other Europeans enjoyed in their own countries." (*Turkey, Greece and the Great Powers*, N. Y., 1917, p. 4.)

¹⁴ The provision found in article IX of the treaty of Venice of 1454 limiting the tariff rate to 2 per cent on imported goods was to a certain extent the basis on which the foreign powers insisted that the customs duties could not be altered without the consent of the nations concerned.

¹⁵ See *Parliamentary Paper*, Turkey No. 2 (1907), "Correspondence Respecting the Increase of the Turkish Customs Duties." [Cd. 3455.]

A protocol, dated April 25, 1907, was signed by Turkey, Germany,

on condition that the Ottoman Government would comply with certain demands made by these powers.¹⁶ The Young Turks tried immediately after the success of their revolution to raise this rate to 15 per cent, but they failed.

Commodities destined for the use of religious and philanthropic institutions were exempted from import duties. No additional tax was imposed on goods in transit to or from the interior. The treaty of August 16, 1838, between Turkey and Great Britain, abolished all taxes imposed by local governors under the form of granting permits for the transfer of goods through their provinces.¹⁷ The American treaty of 1862 limited the transit tax on goods passing through Turkey to 1 per cent in order to give allowance for expenses of administration and control. Export duties were also regulated by the capitulatory treaties; the same American treaty of 1862 limited the export duties to 1 per cent.¹⁸ The

Austria-Hungary, France, Great Britain, Italy, and Russia to give effect to the increase of the import rates (for the text of the protocol, see Martens, *Nouveau recueil général de traités*, 3ème série, I, 790-792 or *St. Pap.*, vol. C, 575). A separate agreement was also signed on the same date between Turkey and Germany to this effect. (See Martens, op. cit., 3ème série, XXXV, 686-689.)

¹⁶ Germany demanded that a portion of the revenue be detained to help pay the kilometric guarantee of the Bagdad railway; France insisted that the dispute concerning the Syrian railway and the quays at Constantinople be settled in her favor; England asked to be compensated with certain mining concessions in Macedonia.

¹⁷ The text of the treaty is found in Noradounghian, G., *Recueil d'actes internationaux de L'Empire Ottoman*, II, 249-253. See article II.

¹⁸ See *infra*, pp. 134-136.

An unusual provision is found in the Anglo-Turkish treaty of 1675,

Franco-Turkish treaty of commerce of April 29, 1861, provided for the same rates on exports and on goods in transit.¹⁹

Perhaps the best illustration of the absence of legal control on the part of the Turkish Government under the economic privileges is that connected with business houses. According to an American report:

There is no law in Turkey obliging any foreign bank, banking house, or mercantile firm wishing to establish a branch house in Turkey to submit itself to any official or legal formalities. Consequently, any bank or private firm is at liberty to establish a branch in Turkey and freely transact and conduct business. . . . Foreign firms conserve their nationality and are governed with regard to their internal organization, and to the rights and duties of its members, according to the law of their country.²⁰

Another important restriction on the free action of the Ottoman Government was the foreign control of the Turkish financial system. The Imperial Iradé, termed the decree of Mouharrem of December 20,

article LXXIV of which stipulates that the King of England shall have the right to purchase for his own use at a minimum duty of 3 per cent two cargoes of figs and raisins in years of fertility. (Noradounghian, op. cit., I, 168 or Hertslet, *Commercial Treaties*, II, 369.)

¹⁹ See articles IV and VIII.

²⁰ Mears, E. G., *Modern Turkey*, N. Y., 1924, p. 431.

The act of November 27, 1887, on the part of the Sublime Porte requiring permits to be obtained from the Ottoman Government by foreign joint stock companies doing business in the Turkish Empire, was held by some foreign powers to be a violation of the capitulatory clauses guaranteeing freedom of commerce. (See *For. Rel.*, 1888, part 2, pp. 1592-1594.)

1881, virtually forced on the Sultan by the foreign powers, instituted the so-called " Dette Publique Ottomane " which gave hand to foreign powers in the financial administration of the Empire through a council of administration which had power to collect the " Five Principal Revenues." ²¹ This institution was designed to protect the interests of the foreign creditors in Turkey and was controlled by Great Britain, France, Germany, Italy, and Austria-Hungary. ²² It became, according to Professor Brown, " the most flourishing and powerful institution in the Empire. It collected at their source many of the taxes assigned to its service and acquired a large authority in fiscal matters all over the Empire." ²³

²¹ For text of decree, see Young, G., *Corps de droit ottoman*, V, 69; the text and other documents relating thereto are found in *Archives diplomatiques*, 1912, CXXIII, 244-278.

²² The council of administration consisted of one representative each for France, Great Britain, Holland, Germany, Austria-Hungary, Italy, and Turkey, and one representative of the Imperial Ottoman Bank. The president of the council was a Frenchman or a Britisher in alternate years. (Bowman, I., *The New World*, ed. 1926, p. 437.)

²³ *Foreign Affairs*, June 15, 1923, I, 77. For further references, see: Adib Roumani, *Essai historique et technique sur la dette publique ottomane*, Paris, 1927; Charles Morawitz, "The Public Debt of Turkey," *North American Review*, August, 1902, CLXXV, 275-288; G. Young, *Corps de droit ottoman*, V, ch. lxxxv; Albert Murat, *Le control international sur les finances de l'Égypte de la Grèce et de la Turquie*, Paris, 1899, livre III; R. L. Buell, *International Relations*, N. Y., 1925, p. 405; W. H. Hall (editor), *Reconstruction in Turkey* (a series of reports compiled for the Armenian and Syrian relief), N. Y., 1918, pp. 220 ff.; *Recueil des cours*, The Hague Academy of International Law, VII, 307; Dupuis (Laurent), *Le contrôle financier de la Dette Publique Ottomane*, Paris, 1908; Du

It is not an unwarranted assumption, therefore, that the economic privileges were among the most objectionable features of the capitulatory system. There is no doubt that these restrictions were in the mind of the Turkish Government when they termed the capitulatory régime as "an intolerable obstacle to all progress in the Empire."²⁴ "The exemption

Velay (A.), *Essai sur l'histoire financière de la Turquie*, Paris, 1903; Delaygue (Louis), *Essai sur les finances ottomanes*, Paris, 1911; Iplijian, *Histoire de développement de la Dette Publique Ottomane*, Strasbourg, 1911; Charles Morawitz, *Les finances de la Turquie*, Paris, 1902; A. Andréadès, "Les obligations financières envers la dette publique ottomane, des provinces détachées de l'Empire Turc depuis le traité de Berlin," *R. G. D. I. P.*, 1908, XV, 585-601. See also *infra*, p. 209, n. 10, and pp. 239-240

The public debt was originally over \$715,000,000, and the main shares were French, 60 per cent, German, 20 per cent, and British, 15 per cent. (Donaldson, J., *International Economic Relations*, N. Y., 1928, p. 349.)

²⁴ In answering the question of the abrogation of the capitulations, a member of the Committee of Union and Progress made the following statement: "For the moment we do not aspire to liberate ourselves except in the *economic* and *financial* matters. . . . We have no interest to emancipate ourselves of the capitulations early. If we obtain this before the right time, it will certainly not fail to create a great difficulty to Turkey." (Kandelafté, J. S., *L'avenir réservé au régime des capitulations*, p. 82.)

It is to be noted that even after the Porte had announced the absolute abolition of the capitulations in 1914 (*cf. infra*, p. 189) the Turkish Government was willing to defer discussion of the abolition of judicial capitulations if the abrogation of fiscal and commercial privileges could be agreed to by the Allied Powers (see *The Times*, London, *Documentary History of the War*, IX, Diplomatic, part III, pp. 128, 277, 281, 286; also, *St. Pap.*, 1915, CIX, 699).

Speaking to the American High Commission in 1919, the Ottoman Minister of Finance stated that "no reason, or pretext of any kind can be found to justify the discrimination of the foreign subjects against the natives of a country in respect to taxes and duties. There-

of foreigners from taxation and the veto of foreign governments over increases in the Ottoman custom duties," remark Toynbee and Kirkwood, "contributed to the pauperisation of the Turkish treasury, placed the Sublime Porte at the mercy of European diplomatists and European financiers and struck a severe blow at native industry and commercial prosperity."²⁵

JURIDICAL PRIVILEGES

The juridical privileges may be discussed under two divisions, namely: (a) Jurisdiction over cases involving only foreigners, whether of the same nationality or of different nationalities; (b) jurisdiction over mixed cases; namely, cases between foreigners and Ottoman subjects.

Under the first division come the consular courts.²⁶ Practically all the consulates in the Ottoman Empire had their own consular courts in which all civil and criminal cases arising among their nationals were tried; this, as a rule, had been the general practice

fore resumption of economical capitulations cannot be allowed in any way even if judicial capitulations be reestablished in some way or other." (Mears, E. G., *Modern Turkey*, p. 444.)

²⁵ Toynbee and Kirkwood, *Turkey*, pp. 136-148.

"It should be stated," said Mr. Ravndal, "that the Powers have abused their economic privileges in many instances to the extent of preventing Turkey from developing her own industries while inferior European goods have been unloaded upon the country in great quantities." (Mears, *Modern Turkey*, 433.)

²⁶ An explanation of the administration of the consular courts is given in G. Young, *Corps de droit ottoman*, I, 279-84.

for centuries and had never been contested. The consular courts had also jurisdiction over property in all questions affecting their nationals with certain exceptions in regard to real property. The intestate descent of foreign real property was governed by the Ottoman tribunals under application of Ottoman law.²⁷ On the other hand, consular jurisdiction in the testamentary disposition of real property and in the succession of personal property of foreigners whether by testament or “*ab intestate*” was recognized by the Porte.²⁸

The consular jurisdiction was also extended over civil cases between foreigners of different nationalities allowing, however, the choice of the parties concerned whereby they might have recourse to Ottoman jurisdiction. If the consular court assumed jurisdiction, as was usually the case, the court of the defendant possessed the authority.²⁹

²⁷ A. Mandelstam, *La justice ottomane dans ses rapports avec les puissances étrangères*, p. 265. See also Appendix II, Art. IV of Law conceding to foreigners the right of holding real estate in Turkey.

²⁸ *Ibid.*, p. 266.

²⁹ C. J. Tarring, *British Consular Jurisdiction in the East*, London, 1887, p. 93.

This was effected through mixed judiciary commissions. The right to call such a commission was reserved to the legation of the country to which the defendant belonged. The mixed commission usually consisted of three judges, two of whom were chosen by the legation of the defendant and the third by the legation of the plaintiff; plurality of opinion constituted the decision which was to be confirmed by the legation of the defendant and executed by it. This system was adopted as early as 1820. (See Calvo, C., *Le droit international théorique et pratique*, 5th ed., Paris, 1896, III, 269, sec. 1432.)

There was full agreement as to the exclusive jurisdiction of the consular courts in criminal matters between foreigners of the same nationality, and up to 1881 the consular courts had jurisdiction over criminal cases involving foreigners of different nationalities as well;³⁰ but, after that date, the Porte claimed jurisdiction for the Ottoman tribunals in cases involving foreigners of different nationalities.³¹ This controversy was never settled.

The consular courts had no jurisdiction over civil or criminal cases between foreigners and Ottoman subjects. By virtue of treaty stipulations, however, certain powers claimed special privileges in criminal matters. They admitted that when the accused was an Ottoman, the Turkish courts had jurisdiction, but, by virtue of their special treaties, they claimed jurisdiction for their consular courts whenever the accused was a foreigner.³² The Porte denied this claim, although it was, on several occasions, obliged to abandon this position.³³

Under the second division come the following channels of justice:

First, the mixed commercial courts. These courts were organized by the consent of the Powers and of

³⁰ The practice of consular jurisdiction over criminal cases involving foreigners of different nationalities was established by usage and was not based on any text. (P. Dislere et De Mouy, *Droits et devoirs des Français dans les pays d'orient et d'extreme orient*, p. 93.)

³¹ Mandelstam, A., op. cit., p. 267.

³² See *infra*, p. 85, n. 44, and pp. 131-132.

³³ A. Mandelstam, op. cit., p. 262.

the Sublime Porte and consisted of three Ottoman judges and two foreign assessors who were to have jurisdiction over all commercial and civil matters between Turks and foreigners which involved a sum larger than 1000 piasters. It was also agreed that all steps taken in the procedure including the rendering of the verdict were to be declared void if a dragoman was not present. In an area where no such tribunal existed, the case was tried in the local courts subject to the right of appeal to Constantinople. The status of these courts was the subject of a prolonged disagreement concerning the position of the two foreign assessors and the dragoman. The execution of Ottoman judgments in favor of Ottoman subjects against foreigners was another source of friction.³⁴

Second, the Ottoman civil and religious courts.³⁵ These courts had jurisdiction over cases dealing with real estate belonging to foreigners. By an imperial decree, dated January 18, 1867,³⁶ foreigners were given the privilege of owning real estate in the Ottoman Empire, with the exception of the province of

³⁴ Mandelstam, *op. cit.*, pp. 257-258. For an account of the organization of the mixed tribunals, see G. Young, *Corps de droit ottoman*, I, 239-250; also, *Juridical Review*, 1891, III, 248 and *R. D. I. L. C.*, 2ème série, 1910, XII, 84-90.

³⁵ For an explanation of the administration of the local courts, see *Juridical Review*, 1891, III, 245. Also, A. Bertram, "The Legal System of Turkey," *Law Quarterly Review*, Jan. 1909, XXV, 24-43.

³⁶ See Appendix II.

the Hedjaz, subject to Turkish law.³⁷ According to this decree, foreigners were to be placed upon terms of equality in all matters concerned with real property. The legal effect of this equality made the foreigner subject to all local taxes levied upon landed property. It also brought the foreigner under all laws and regulations governing the ownership, "the transmission, the alienation and the hypothecation of landed property," and rendered him directly amenable to the Ottoman courts in all cases relating to real estate, whether the parties were foreigners or mixed, foreigners and Turkish subjects. "In short," reads the rescript, "they (the foreigners) are in all things to hold real estate by the same title, on the same condition and under the same forms as Ottoman owners, and without being able to avail them-

³⁷ Up to 1867 foreigners could not hold real estate in Turkey except under borrowed names, i. e., foreign real property had been held in trust for the alien owner by a subject of the Porte in whose name the property was registered. In some instances, however, this disability had been evaded by female relatives of foreign residents who had enrolled themselves as members of a Turkish non-Moslem community possessing the right of holding real estate. This had given rise to a common abuse whereby a foreigner owning real estate under borrowed names escaped the seizure of his property on his becoming bankrupt. It is of interest to note that an exception to this disability had grown up in Smyrna where foreigners had, for nearly a century before 1867, acquired permission to hold real estate in their own name. (See McCoan, *Our New Protectorate*, II, 195.)

The right of foreigners to hold real estate in Turkey in their own names as granted in the decree of 1867 did not extend to foreign corporations. By an Imperial Iradé, however, exception was made in the case of educational institutions whereby the institution itself was given the right to hold the property in its own name. (See J. L. Barton, *Daybreak in Turkey*, Boston, 1908, p. 244.)

selves of their personal nationality, except under the reserve of the immunities attached to their persons and their movable goods, according to the treaties.”³⁸

The Ottoman civil tribunals, composed exclusively of Ottoman judges, also tried, in the presence of the dragoman, mixed cases involving disputes over less than 100 piasters. However, in localities more distant than nine hours' travel from the residence of the consular agent, foreigners could be tried by a Turkish tribunal, without the presence of the dragoman, for actions involving the sum of less than one thousand piasters and for offences entailing a fine of not more than five hundred piasters. Against judgments issued by such a tribunal, appeals were to be allowed which were to be followed and judged with the assistance of the dragoman. The execution of a sentence was to be suspended during the process of the appeal.³⁹ The conflict raised over the

³⁸ In the event of a foreigner's bankruptcy, the real property of the bankrupt could be sold for the benefit of the creditors after application to the local courts had been made and could also be sold in satisfaction of judgments obtained in foreign courts without the formality of a fresh action in the Ottoman courts. The local courts were also to have jurisdiction over the intestate descent of foreign real property. As to actions brought by third parties of foreign nationality against foreign succession, it was agreed that they were to be tried by the mixed commercial courts.

³⁹ The protocol confirming the decree of 1867 and to which most of the capitulatory powers adhered is found in Appendix III. This provided for the acceptance by the signatory powers of the decree relative to foreign ownership of real estate and of the arrangements therein; it also gave the local authorities the right to enter the residence of a foreigner more distant than nine hours' travel from the

function of the Ottoman courts in regard to foreigners was one of the chief sources of controversy and never reached a definite solution.

Third, the Ottoman criminal courts.⁴⁰ These courts which were composed of Ottoman judges tried criminal acts committed by foreigners against Turks, as well as acts committed by Ottomans against foreigners;⁴¹ in either case the trial was to be made in the presence of the consular delegate whose signature was necessary to make the sentence effective.⁴²

residence of the consular agent without the presence of the consular delegate, but this was to be permitted only in case of emergency. Furthermore, the right of defence and publicity of hearings were to be assured in proceedings against foreigners in Turkish tribunals. France adhered to the Protocol in 1868 (*St. P.*, LIX, 389-391), Great Britain in 1868 (*Parl. P.*, LXIV, 4145), Russia in 1873 (*St. P.*, LXVIII, 1262-64), Greece in Feb. 1873 (Noradounghian, *op. cit.*, III, 343), Italy on March 23, 1873 (*ibid.*, p. 345), The Netherlands on August 6, 1873 (*ibid.*, p. 351), and the United States in 1874 (*St. P.*, LXV, 370-373).

⁴⁰ The testimony of the non-Moslem in the local courts was not held of equal value with that of the Moslem until 1854 when an imperial decree, dated March 16 of that year, was issued providing for the admissibility of the testimony of Christians in criminal matters against or in favor of Mohammedans. (See Van Dyck, "Report on the Capitulations of the Ottoman Empire," p. 76; also, O. Focief, *La justice turque et les réformes en Macédoine*, p. 152.)

⁴¹ "Dans le cas de crime ou de délit, si la victime était un sujet ottoman, l'article 65 de la capitulation de 1740, attribuait compétence à l'autorité locale qui jugeait en présence du consul ou du drogman. Mais, dans la pratique, il a été admis que le coupable pouvait être déféré à la justice consulaire. Quand le sujet ottoman était non la victime, mais l'auteur de l'infraction, les tribunaux locaux étaient compétents." (A. Bonde, *Traité élémentaire de droit international public*, Paris, 1926, p. 285.)

⁴² In case the dragoman refused to sign the sentence, it could only be carried into effect after negotiations with the higher authorities. (Tarring, *British Consular Jurisdiction in the East*, 1887, p. 91.)

The procedure was subject to the agreements reached concerning the search and the inspection of the foreigner's residence.⁴³ Disputes arose between some of the foreign powers and the Sublime Porte as a result of claims for special privileges in criminal matters, but with no definite solution.⁴⁴

⁴³ Since 1868 the inviolability of the domicile of a foreigner was deemed limited to residences within nine hours journey from a consular post (cf. *supra*, p. 83, n. 39). McCoan refers to the nine hours distance as consisting of 27 miles, although the protocol providing therefor seems to be silent on this point (see McCoan, *Our New Protectorate*, II, 197).

⁴⁴ The capitulatory treaties of Belgium of August 3, 1838 (Nora-dounghian, *op. cit.*, II, 245, art. VIII), of Portugal of March 20, 1843 (*ibid.*, II, 356, art. VIII), of Sardinia of October 25, 1823 (*ibid.*, II, 101, art. IX), of the United States of May 7, 1830 (*ibid.*, II, 193, art. IV), and of the Hanse cities of August 20, 1839 (*St. P.*, XXVIII, 450, art. VIII), contained a special provision, not found in the capitulations of the other powers, allowing the nationals of the mentioned signatory powers accused of crime to be tried and punished by their respective consular courts. The extent to which this concession was practiced is illustrated by the American and Belgian test cases of 1905:

In the American case, two naturalized American citizens of Ottoman origin were arrested and tried by the Turkish authorities on the charge of killing an Armenian merchant in Constantinople. The demand of the United States that the accused be tried and punished by the American Consulate General in accordance with the provisions of the Turkish-American Treaty of 1830 (see *infra*, p. 130) was refused by the Ottoman Government. The men in question were tried and sentenced by the local courts without the presence of the dragoman, one of them being condemned to death and the other to fifteen years imprisonment. Finally, as a result of the representation of the American embassy in Constantinople the Turkish Government ordered that the execution of the death sentence be suspended, and the matter rested in this form. (See *For. Rel.*, 1905, pp. 885-898.)

The famous Belgian case, known as the "Joris case," arose in connection with Joris, a Belgian subject, who was condemned to death

It is safe to state, therefore, that only a small amount of friction arose concerning jurisdiction over cases involving foreigners of the same nationality or of different nationalities and that the chief source of conflict lay in the field of jurisdiction over cases between foreigners and Turks. In the language of André Mandelstam :

In matters involving control by the powers, i. e., questions dealing with the legal relations between foreigners and Ottoman subjects, the situation could not be better characterized than by calling it the domain of conflicts. The composition of the civil courts hearing mixed cases; the rights of foreign assessors in the mixed commercial courts; the law to be applied by these commercial courts; the jurisdiction of the religious tribunals over foreigners; the right of supervision by the dragoman and its extent in civil and criminal matters; the execution of judgments rendered by Ottoman tribunals against foreigners in both civil and criminal cases; the detection of foreigners before trial, and many other questions of the same nature cause daily conflicts between the Sublime Porte and the diplomatic missions.⁴⁵

by the Turkish authorities on the charge of an attempt on the life of the Sultan. The Belgian dragoman who was present at the trial refused to sign the sentence; thereupon, the Belgian representative, as in the American case, demanded that the accused be handed over to the Belgian Government for trial and punishment as provided in the Turco-Belgian treaty of 1838, but the Porte refused to comply with the demand. The case, however, was finally settled by the action of the Turkish Government in releasing Joris on the condition of his leaving the country. For references on the case, see: *A. J. I. L.*, 1907, part I, p. 485; P. M. Brown, *Foreigners in Turkey*, p. 80, n. 8a; A. Mandelstam, *La justice ottomane dans ses rapports avec les puissances étrangères*, p. 165; *R. D. I. L. C.*, 2ème série, 1906, VIII, 52-56, 119-135, 363-382; *ibid.*, 1910, XII, 426-433; *R. D. I. privé*, 1906, II, 379-392, 659-683; *R. G. D. I. P.*, 1907, XIV, 554.

⁴⁵ A. Mandelstam, *op. cit.*, p. 268.

ADDITION OF PRIVILEGES THROUGH USAGE

It is finally to be remembered that besides the specific rights granted in the treaties many usages grew up as the Ottoman Empire began to decay, thus adding a mass of traditional usages to the treaty guarantees. Most consulates, for instance, had refused to submit their mail to the Ottoman postal service, and they were consequently allowed to maintain their own post offices on Ottoman territory.⁴⁶ This privilege was in most cases abused by some of the powers, and it was, therefore, one of the capitulatory rights to the existence of which the Ottoman Government was strongly opposed.⁴⁷ That these privileges which were added through usage as the Empire declined, as well as the capitulatory rights

⁴⁶ Before the abrogation of the capitulations in 1914 (see *infra*, p. 189) six European powers maintained their own post offices in Turkey, namely: Austria, France, Italy, Russia, Great Britain, and Germany. Austria was the first to establish its post office in Turkey in 1748. It was followed by Russia in 1799; by France in 1812; by Great Britain in 1832; by Germany in 1870. (See "Turkey," A Commercial and Industrial Handbook, Trade Promotion Series, No. 28, Wash., 1926, p. 67.) For further references on the question of foreign post offices in Turkey, see: Bonfils-Fauchille, *Manuel de droit international public*, 7th ed., p. 164, n. 2, sec. 260; P. M. Brown, *Foreigners in Turkey*, p. 95; *Chunet*, 1901, XXVIII, 617-632; Fauchille, P., *Traité de droit international public*, 1922, part 1, I, 441; *R. G. D. I. P.*, 1895, II, 365-372; *ibid.*, VIII, 777-797 and 1914, XXI, 493; *St. P.*, 1912, CV, 681-682.

⁴⁷ "The foreign post offices," said Professor P. M. Brown, "crept in insiduously and deprived the Ottoman postal service of a large revenue, as well as enabling foreigners to evade provisions of Turkish law relating to customs duties and to censorship." (*A. J. I. L.*, XVII, 292.)

in general, had given an advantage to the foreigner in Turkey, and that they often left the foreigner free from the restraints of law ⁴⁸ can hardly be denied.⁴⁹ A passage from Edward Dicey's article on the capitulations well describes the situation and is worth quoting :

"Every community possessing capitulations," he said, "formed throughout the Ottoman Empire a sort of imperium in imperio. Every European colony on Ottoman territory possesses, under the capitulations, rights not accorded to Mahometan subjects of the Sultan, and these rights and privileges are employed by these colonies to increase their wealth, to enlarge their privileges, and to establish their independence."⁵⁰

⁴⁸ "Foreigners in Turkey before 1914," remarked Prof. Brown, "enjoyed so privileged a status that they were not only free from the restraints of Turkish laws, but also from the restraints of their own laws." (*A. J. I. L.*, 1923, XVII, 292.)

⁴⁹ In addition to these restrictions, Turkey's sanitary administration was controlled by a Council of Health composed of eight Ottoman subjects and thirteen representatives of the Powers. The Powers were Germany, Austria, Belgium, Spain, the United States, France, Great Britain, Greece, Italy, the Netherlands, Persia, Russia, and Norway and Sweden. (For a complete documentary account of the Sanitary administration, see G. Young, *Corps de droit ottoman*, III, 125-194. On the settlement after the War, see *infra*, p. 246, n. 33.)

⁵⁰ *The Nineteenth Century and After*, 1906, LX, 21.

CHAPTER V

THE SYSTEM OF THE CAPITULATIONS (*Continued*)

NON-MOSLEMS IN TURKEY AND THE MILLET SYSTEM

To be distinguished from the foreign capitulations, there were the privileges of the so-called " millets " or religious communities granted to the Turkish non-Moslem subjects in Turkey.¹ There were in 1914 some thirteen millets recognized by the Sublime Porte.² Each of these was allowed to have a patriarch

¹ Cf. *supra*, pp. 48 ff.

² These millets were: (a) The Greek community which included all members of the Orthodox church recognizing the Œcumenical Patriarch whose seat was in Constantinople; (b) Latins, or Catholics, who use the Roman liturgy, consisting of the descendants of the Genoese and Venetian settlers and other native Catholics of the Latin ritual; (c) Armenian Gregorians, under their patriarch in Constantinople, but giving allegiance to the Catholics at Echmiadzin, in Russian Armenia; (d) Armenian Catholics, under a patriarch at Constantinople; (e) Syrian Catholics under a patriarch at Mardin; (f) Chaldean Catholics, under a patriarch at Mosul; (g) Syrian Jacobites, under a patriarch at Mardin; (h) Protestants consisting chiefly of converts among the Armenians; (i) Melchites, under a patriarch at Damascus; (j) Jews of two rites; (k) Bulgarian Catholics, under the Bulgarian Exarch; (l) Maronites, chiefly in the Lebanon, under the Patriarch of Antioch; (m) Nestorians, whose patriarch had his residence in the mountains of Kurdistan. (See E. Powell, *The Struggle for Power in Moslem Asia*, 1923, pp. 60-61.) On the non-Moslem population of the Ottoman Empire, see: E. Pears, *Turkey and its People*, London, 1912; C. N. E. Eliot, *Turkey in Europe*, London, 1900; G. F. Abbott, *Turkey in Transition*, London, 1909, pp. 70-74, 87-98; W. Denton, *The Christians of Turkey: Their Condition under Mussulman Rule*, London, 1877; W. S. Monroe, *Turkey and the Turks*, London, 1908, chs. v, vi, vii; E. Poujade, *Chrétiens et Turcs*, Paris, 1862; J. L. Barton, *Daybreak in Turkey*,

or a religious head who was the chief protector of his community and who was responsible, in behalf of the community, to the Sultan. Taxes were in most cases collected through the heads of these millets.³ Important among the privileges granted to these communities was the right to maintain independent courts in which all cases relating to religious rites as well as a certain class of civil cases were tried.⁴ The freedom of the use of the community's own language was extended and several other privileges such as the maintenance of schools, the establishment of religious institutions, etc., were granted.⁵

Boston, 1908, chs. v, vi, vii; R. Davey, *The Sultan and his Subjects*, London, 1897, II; V. Jabotinsky, *Turkey and the War*, London, 1917, chs. vii, viii; M. Maccoll, "The Christian Subjects of the Porte," *The Contemporary Review*, Nov., 1876, XXVIII, 970-989; W. H. Hall, (editor), *Reconstruction in Turkey*, A series of Reports compiled for the American Committee of Armenian and Syrian Relief, N. Y., 1918, pp. 9-28; A. Riley, "Christians and Kurds in Turkey," *The Contemporary Review*, Sep., 1889, LVI, 452-468.

³ Non-Moslems living under Moslem rule were in the early period of Islam subject to a tax known as "Kharadj." This was later abolished by the Turks and replaced by the military exemption tax, "Bedel-i-Askariyeh."

⁴ The Imperial charter of February 18, 1856 (see *infra*, p. 91, note 7), provided that "all commercial, correctional, and criminal suits between Mussulmans and Christian or other non-Mussulman subjects, or between Christians or other non-Mussulmans of different sects shall be referred to mixed Tribunals." (A documented account of the judicial privileges of the non-Moslem communities in the Ottoman Empire is found in G. Young, *Corps de droit ottoman*, II, 165 ff.)

⁵ See Historical statement on the problem of minorities in Turkey read by the Turkish Delegate at the Lausanne Conference at the meeting of Dec. 12, 1922, of the Territorial and Military Commission. (Turkey No. 1 [1923], Cmd. 1814, pp. 190-204.)

These privileges are to be distinguished from the foreign capitulatory privileges in that they were not included in a treaty. Enforcement, therefore, rested wholly on the will of the Sultan. Furthermore, they were not as extensive as the foreign privileges were, especially in tax exemptions. They were merely guaranties which had been repeatedly given in the Ottoman constitutions and in the many proclamations made by the Sultans on several occasions; but these charters of liberty and of the rights of man such as those granted in the decrees of November 3, 1839,⁶ and of February 18, 1856,⁷ as well as those con-

⁶ This decree of 1839, sometimes called "Tanzimat" or organizations, guaranteed security for life, honor, and fortune to all the subjects of the Ottoman Empire, made illegal the confiscation of the property of the innocent heirs of a criminal, and provided for a regular system of taxation and for a defined system of military service. (For the text of the decree, see: Aristarchy Bey, *Législation Ottomane*, II, 7; Noradounghian, op. cit., II, 290-294; Testa, *Recueil des traités de la Porte Ottomane*, V, 140; E. P. Engelhardt, *Turquie et le Tanzimat*, pp. 257-261. For English version, see *Great Britain Foreign Office, Historical Section, Peace handbooks*, III, No. 2, pp. 139-142 and E. A. Van Dyck, "Report on the Capitulations," p. 106.)

⁷ Known as the Hatti Humayun of February 18, 1856, this decree confirmed the previously granted charter and provided, among other things, for: (a) the admissibility of all the subjects of the Empire without distinction of nationality to public employments according to their capacity and merit; (b) the admissibility of all subjects without distinction of religion into the civil and the military schools of the Government; (c) publicity in trials and assurance to all, without discrimination on account of religion, the right to produce witnesses before the courts; the testimony was to be received upon an oath taken according to the religious law of the witness. The decree also made it lawful for foreigners to possess landed property in Turkey subject to the local laws and police regulations. This was to be effected by special agreements to be made with each of the powers.

ferred in the Ottoman constitution of December 23, 1876, of Midhat Pasha⁸ and in that of the Young Turks of 1909⁹ had not been put into practice, con-

(For the text of the decree, see: Aristarchy Bey, *op. cit.*, II, 14; Noradounghian, *op. cit.*, III, 83-88; Testa, *op. cit.*, V, 132; Engelhardt, *op. cit.*, pp. 263-270. The English version is found in *Great Britain Foreign Office, Historical Section, Peace Handbooks*, III, No. 2, pp. 142-147.)

⁸ This constitution provided for a parliamentary form of government, a bicameral legislature to be composed of a senate and of a chamber of deputies. The senators were to be named directly by the Sultan and their number was not to exceed one third the number of the deputies. The deputies were to be elected by the people, one for every 50,000 male inhabitants of Ottoman nationality. The Grand Vizier (prime minister) was to be appointed directly by the Sultan, and the ministers who were to be nominated by the Sultan were to be responsible for their acts. While Islam was to be the State religion, freedom of worship was assured to all subjects of the Empire.

The Constitution also provided, among other things, for: security of personal liberty and property; equality before the law to all without distinction; abolition of torture; eligibility to public office for all without distinction; freedom of the press.

The Constitution finally provided that no provision thereof could "under any pretext whatever be suspended or ignored." (For text, see: *St. Pap.*, LXVII, 683-698; *A. J. I. L.*, Supplement, 1908, II, 367-387; A. Ubicini, *La constitution ottomane du 7 Zilhidge, 1293 [Dec. 23, 1876]*, Paris, 1877.)

⁹ Shortly after its proclamation, the Constitution of 1876 was suspended by Sultan Abdul Hamid who introduced a rule of terror and absolutism. His rule was, however, put to an end when the Young Turks' revolution broke out and succeeded in deposing the despot ruler. The reins of the Government now in the hands of the Young Turks Committee of Union and Progress, the constitution of 1876 was reproclaimed with certain modifications; but due to the Balkan wars and other factors the constitution was again put aside. The text of the constitution as revised by the Young Turks (Aug. 5/18, 1909) is found in *For. Rel.*, 1909, pp. 585-594; for a detailed account of the constitutions of 1876 and of 1909, refer to Lord Eversley and V. Chirol, *The Turkish Empire*, London, 1923, pp. 316-351.

sequently giving birth to the question of non-Moslem communities in Turkey where in many cases various communities revolted, leading to foreign intervention.¹⁰

THE PROTÉGÉ SYSTEM

Foreign political interests later rendered the question more complicated, especially after the development of what is called the protégé system—the system by which Ottoman subjects could acquire foreign nationality or foreign protection without being required to reside in the country granting the protection and thereby be entitled to the capitulatory privileges enjoyed by the nationals of that country in Turkey; ¹¹ this, as we shall see, had been one of

¹⁰ By the treaty of peace of Paris of March 30, 1856 (Martens, *Nouveau recueil général des traités*, XV, 770), the right of any European power to interfere with the affairs of the Sultan and his subjects was denied. Turkey was placed under the guarantee of Europe and her integrity was recognized by the Powers (arts. 7, 9); this, however, did not prevent foreign intervention for the cause of the non-Moslem communities in Turkey. In violation of the Treaty, France, without consultation, landed 6000 troops in 1861 to protect the Christians of the Lebanon. Again, Russia's insistence on the introduction of domestic reforms in Turkey was one of the major causes which led later to the Russo-Turkish War of 1878. In the treaty of Berlin of July 13, 1878 (*St. P.*, LXIX, pp. 749-768), special provisions were inserted in favor of the Armenians with clauses regarding religious liberty, and the Porte was to keep the Powers periodically informed of the steps taken to this effect (arts. 61, 62). By proclaiming equality of Ottoman subjects, the Young Turks' Government (1909) attempted to do away with the privileges enjoyed by the non-Moslem communities in the Empire, but the latter declined to yield.

¹¹ An excellent account of the protégé system is given in Francis Rey, *La protection diplomatique et consulaire dans les échelles du*

the most abused privileges under the capitulatory régime. Generally speaking, there were four classes of protégés in Turkey.

First, we may cite the foreign protégés. It has been indicated that foreign nations were allowed by Turkey to assume protection of nationals of other foreign nations trading in Turkey. France, as we have seen, played an active part in the early development of the capitulatory system extending her protection, for a certain period, over all foreigners who belonged to countries which had not acquired capitulatory rights in Turkey.¹² This privilege, however, lost its significance later by reason of the fact

Levant et de Barbarie, pp. 244-450. For further references, see: P. Arminjon, "La protection en Turquie et en Égypte," *Revue du droit public et de la science politique*, 1901, XVI, 5-44; E. M. Borchard, *The Diplomatic Protection of Citizens Abroad*, p. 468; P. M. Brown, *Foreigners in Turkey*, p. 93; Dislere et De Mouy, *Droits et devoirs des Français dans les pays d'orient et d'extreme orient*, p. 45; (*For. Rel.*, 1898, p. 1109; *ibid.*, 1900, p. 920; F. E. Hinckley, *American Consular Jurisdiction in the Orient*, p. 83; "Extraterritoriality as affecting Questions of Nationality and Citizenship," *House Doc.* No. 326, 59th Cong., 2d sess., p. 206; J. Jacquemin, *La juridiction pénale des consuls Français dans les pays hors Chrétienté*, pp. 34 ff.; A. Mandelstam, *La justice ottomane dans ses rapports avec les puissances étrangères*, p. 174; Moore, *Digest of International Law*, II, 736-747; E. Nys, *Le droit international*, nouvelle édition, Bruxelles, 1912, II, 473 et seq.; Oppenheim, *International Law*, 3d edition, 1920, I, 466; Péliissié du Rausas, *Le régime des capitulations dans l'Empire Ottoman*, II, 23-40; *R. D. I. L. C.*, 1869, I, 131; Y. Rioche, *Les juridictions consulaires Anglaises dans les pays d'orient*, pp. 239 ff.; Testa, *op. cit.*, I, 224 ff.; J. Westlake, *International Law*, Cambridge, 1910, part I, pp. 206 ff.; "X," "Des protégés en Turquie," *Clunet*, 1900, XXVII, 314-321.

¹² See *supra*, pp. 55-57.

that most of the powers acquired capitulations in the eighteenth and the nineteenth centuries.¹³ The few foreigners left without diplomatic or consular representation in Turkey, such as the Swiss,¹⁴ were entitled to elect one of the foreign powers represented in Turkey to assume their protection.

Under the second category come the consular protégés such as the native consuls, vice-consuls, agents, dragomans, clerks, and guards; these were entitled to the same privileges enjoyed in Turkey by the nationals of the country employing them. These privileges, again, could hardly be abused if faithfully carried out, since the number of these protégés was limited. Although no western country would have granted these privileges to native consular officials

¹³ A detailed account of the foreign protégés is found in F. Rey, *op. cit.*, pp. 199-243; see also, J. Jacquemin, *op. cit.*, p. 27 et seq., and Y. Rioche, *op. cit.*, pp. 261 ff.

¹⁴ In a note, dated March 22, 1890, (Noradounghian, G., *Recueil d'actes internationaux de l'Empire Ottoman*, IV, 500), addressed to the French ambassador in Constantinople, the Turkish Foreign Minister signified his consent to the application of the Franco-Turkish arrangements in the determination of the status of the trade and nationals of Switzerland.

By the protocol of August 26, 1890, (Noradounghian, *op. cit.*, IV, 498), signed by Germany and Turkey, Swiss nationals residing in the Ottoman Empire and willing to place themselves under German consular jurisdiction were given the privilege of enjoying all the immunities granted to German nationals in Turkey by treaty arrangements or otherwise.

Swiss law, on the other hand, authorized Swiss nationals residing or trading in Turkey to choose the consulates under whom they wanted to place themselves. (Y. Rioche, *Les juridictions consulaires Anglaises dans les pays d'orient*, p. 264.)

delegated by a foreign nation, we may assume that they were granted in conformity with the principle of international law that consular officials are to enjoy certain extraterritorial immunities.

Thirdly, there were certain monasteries and religious communities in Turkey, some of which had been under the protection of the Papal States, which were entitled to foreign protection. These were regarded as of the nationality of the power which acquired the right to extend the protection. The superior officials together with the heads and the dragomans of these religious establishments were entitled to immunities, more or less similar to those granted to consular establishments. Certain exemptions from customs duties were also granted to these organizations.¹⁵

The protégés under the fourth category were the most numerous; these were the native protégés whose privilege of foreign protection was permanent and hereditary.¹⁶ Any Ottoman subject, whether Moslem or non-Moslem, could acquire the right of

¹⁵ France was the champion of the Roman Catholic Church in Turkey and was given the right to assume the protection of some of the holy places in Palestine. The Catholics in northern Albania were under the protection of Austria. Russia, on the other hand, claimed and enjoyed the privilege of protecting the Greek Orthodox Church in Turkey as successor of the Byzantine Empire. (See F. Rey, *op. cit.*, pp. 305-384.)

¹⁶ These were also called "*de facto* subjects" of the protecting state; their anomalous position was based on custom and treaties and there was no special rule concerning them in so far as the law of nations is concerned.

protection from a foreign country without being required to reside in that country.¹⁷ This right—the right to extend protection to Ottoman subjects—that the foreign powers enjoyed in Turkey was the most abused of all the privileges under the capitulatory régime.¹⁸ It was later used by some of the powers as a means of furthering their political interests.¹⁹

ABUSES OF THE PROTÉGÉ SYSTEM

That a foreign power may assume the protection of nationals of another foreign power within a third state has often been conceded by nations; but the question becomes, indeed, intolerable when this for-

¹⁷ This protection thus granted did by no means constitute full adoption by a state or naturalization, for those who received it retained their true nationality outside Turkey. (See J. Westlake, *International Law*, 1910, part 1, p. 206.)

¹⁸ The abuse by consuls in respect to giving protection to persons of other than their own nationality does not seem to have been uncommon in the early period of Turkish reign. We find in the Florentine Capitulation of 1460 (cf. *supra*, p. 53) a provision prohibiting the Florentine consuls in Turkey from extending protection to other than nationals of Florence. A fine of 1000 florins was to be imposed upon the Florentine consul in case this provision was violated. (See Miltiz, *Manuel des consuls*, Book 2, part 1, II, ch. i, p. 146, sec. 3.)

¹⁹ Commenting on the extension of protection by foreign powers to native subjects in eastern countries, J. Westlake remarks: "It is an objectionable practice for several reasons. It enables a Western state, by gathering under its flag recruits who have little connection with it, to acquire an influence in the country out of proportion to its trade and to the number of residents really belonging to it; and it impedes the progress of the Eastern state by making it easy for its proper subjects to withdraw themselves from its control." (J. Westlake, *International Law*, 1910, part I, p. 207.)

foreign protection is extended to millions of *native citizens* who hold allegiance to the sovereign within whose dominions the foreign power claims the protection. On the payment of a certain sum of money, patents for life, known as “*barat*,” were issued by foreign ambassadors in Turkey to Ottoman subjects by which the latter became entitled to foreign protection. A French ambassador was reported to have received a sum exceeding 400,000 francs from this source and a British ambassador 2000 to 3000 pounds from the same source.²⁰

Austria had at the end of the eighteenth century more than 200,000 subjects under her protection in Moldavia alone. In Valachia, Emperor Joseph II had distributed 60,000 patents of protection; when Russian influence superseded in the region, however, the Austrian patents were transformed to Russian patents.²¹

In 1774, according to the treaty of Kutschuk-Kainardji, Russia had in the Ottoman Empire more than seven million Greeks and Armenians of Ottoman nationality under her protection.²²

Of the 300,000 Greeks in Turkey entitled to Greek protection as recorded in the Greek consulate, 150,000 were found to be born of Turkish parents on Turkish soil, and in Constantinople alone there were

²⁰ F. Rey, *op. cit.*, p. 262; also, Testa, *op. cit.*, I, 226.

²¹ F. Rey. *op. cit.*, p. 265.

²² Du Rausas, *Le régime des capitulations dans l'empire ottoman*, II, 34.

21,000 of Ottoman nationality who had fraudulently acquired the Hellenic nationality.²³

An interesting case is cited by Engelhardt whereby an Ottoman subject who had appeared as an Ottoman national in a suit before the Turkish court shortly thereafter reappeared as a Russian subject in the same suit, this time accompanied by a dragoman of the Russian embassy.²⁴ "It is easy to see," says Arminjon, "the disorder, the conflicts, the injustices and the various difficulties which were caused by these incredible abuses."²⁵

ORIGINAL DEVELOPMENT OF THE PROTÉGÉ SYSTEM

A word or two may be said as to how this state of affairs originated. In the middle of the sixteenth century the ambassadors in Turkey communicated with the Turkish Government through interpreters or "dragomans"²⁶ who were recruited from the Turkish non-Moslem communities. Notwithstanding the responsibility that their position involved, these interpreters remained subject to Ottoman jurisdiction and enjoyed no other rights than the rights granted by the Sultans to the members of the communities to which they belonged. The Turkish authorities were rather suspicious of these interpret-

²³ Ibid., II, 35; also F. Rey. op. cit., p. 285 and P. Arminjon, *Revue du droit public et de la science politique*, 1901, XVI, 11.

²⁴ Ibid., p. 11.

²⁵ Ibid., p. 12.

²⁶ The term "dragoman" is derived from the Arabic word "tirgi-man" meaning interpreter.

ers. At the beginning of the seventeenth century a dragoman was imprisoned by the local authorities and publicly hanged; the answer to the protest of the employing ambassador was that the person in question was an Ottoman subject and that he had no right to interfere with the domestic questions of the Empire. Handicapped under these circumstances, the foreign representatives decided to train their own nationals for the office; but the increasing demand for interpreters, on the one hand, and the difficulty experienced by foreigners in mastering the Turkish language, on the other, rendered the success of the scheme impossible. An arrangement was made later, however, by which the dragoman became subject to the jurisdiction of the employing embassy and thereby entitled to all immunities granted to the nationals of the employing country.²⁷

This privilege was later extended to the servants of the foreign representatives, the native consuls and vice-consuls, to the Janissaries (guard), and to all those who were employed by the embassy. Then followed the sale of patents of protection to wealthy Ottoman subjects who found in the capitulatory privileges security and economic advantages. In virtue of the patent the foreign protection was not confined to the purchaser only, but it was extended to all the family. It was hereditary and could be

²⁷ "We grant to interpreters serving the ambassador the same privileges given to French nationals." (Article XIV of the French Capitulation of 1673.)

transferred for a consideration. These patents of protection were rather limited, at the beginning, to those who could afford to buy them; but the situation took a different aspect when the limitation was removed and the patents were issued on a large scale for political purposes. It seems obvious, therefore, that the capitulations ceased to be a matter of only judicial privileges for foreigners in Turkey, as they also became a political instrument in the hands of some of the powers. Foreign protection was even extended to Ottoman Moslems, who, in virtue of the protection, became entitled to the capitulatory privileges of the protecting nation.

ATTEMPTS TO CHECK ABUSES

Napoleon tried in 1806 to put an end to the issuance of these "barats" by denying such a right for France. The other powers, however, did not follow his example. Several attempts were later made by the Sublime Porte to prevent the issuance of the patents of protection to Ottoman subjects. In a note, dated January 27, 1852, and addressed to the foreign representatives in Constantinople, the Turkish Government declared that it would no longer recognize the foreign protection of Ottoman subjects except that concerned with natives attached to the service of the foreign legations or consulates.²⁸ Again, on September 14, 1860, Ali Pasha sent a mem-

²⁸ P. Dislere et R. de Mouy, *Droits et devoirs des Français dans les pays d'orient et d'extreme orient*, p. 45.

orandum to the foreign legations, notifying them of the measures that the Sublime Porte had decided to adopt in regard to these native protégés; it was declared in the note that the new protégés were to be subjected to Ottoman jurisdiction and that no inheritance of rights for protection would be allowed; these new protégés were to leave Turkey within three months following the declaration of their change of nationality.²⁹ The only result of this memorandum was the appointment of a mixed commission to revise the titles of protection.³⁰

REGULATION OF 1863

On April 24, 1862, another circular was addressed to the diplomatic corps requesting the powers to settle in common accord with the Sublime Porte the question of the protégé system. The powers re-

²⁹ Du Rausas, *op. cit.*, II, 36.

³⁰ It is to be noted in this connection that in most of the capitulations of the nineteenth century a clause was inserted by which the beneficiary state undertook not to issue these "barats" except to persons engaged in the service of the ambassador or the consuls. (See: The Anglo-Turkish treaty of Jan. 6, 1809, Noradounghian, *op. cit.*, II, 83, arts. 9, 10; the treaty of October 25, 1823, with Sardinia, *ibid.*, II, 101-102, art. 13; the treaty of May 28, 1827, with Sweden, *ibid.*, II, 127, art. 2; the treaty of May 7, 1830, with the United States, *ibid.*, II, 193, art. 5; the treaty of Feb. 12, 1833, with Tuscany, *ibid.*, II, 225, art. 11; the treaty of August 3, 1838, with Belgium, *ibid.*, II, 245-246, art. 9; the treaty of March 20, 1843, with Portugal, *ibid.*, II, 356-357, art. 9.) It is not an unwarranted assumption, however, that these powers did not keep to the letter of their pledges as Turkey grew weaker and weaker and as the political interests of the powers grew in importance.

sponded and with their consent the regulation of August 9, 1863,³¹ was proclaimed by the Ottoman Government. This regulation defined the number of persons who were to be employed by the embassies, by the consulates, by the ecclesiastical missions, and by the foreign monasteries. It also provided that no Ottoman subjects were to be employed as consuls or vice-consuls without special arrangements with the Porte; furthermore, the protection was not to be extended to the family or to descend to the heir of the employee, but it was to cease on his dismissal.

The regulation, however, was not retroactive, that is, patents of protection issued before August 9, 1863, were to remain hereditary and were by no means to be affected. The rescript hence created a new class of native protégés who were entitled to temporary protection and the result thereof was nothing more than a check for further abuses; what had been done in the past was to remain.

TURKISH COMPLAINTS

It was not long after the promulgation of the decree of 1863 when the Sublime Porte began to

³¹ For text, see Van Dyck, *op. cit.*, pp. 96-97; also: F. Rey, *op. cit.*, pp. 520-523; Testa, *op. cit.*, I, 228; P. Arminjon, *Étrangers et protégés dans l'empire ottoman*, pp. 325-330; *St. P.*, LXVIII, 1046-1049; *Clunet*, 1893, XX, 458-462. In connection with this regulation, a circular was sent by the Ottoman Government to the governors-general, asserting that the regulation of August 9, 1863, had "for its sole object to put an end to a crowd of abuses that had crept in a long time ago, and to dispel every cause of difficulty with foreign agents." (See Van Dyck, *op. cit.*, pp. 97-99; also, *St. P.*, LXVIII, 1049-1052.)

realize that practically nothing had been done by the Regulation. In its note of September 14, 1866, the Ottoman Government enumerated the many unchecked abuses,³² and again in April, 1869, it complained to the powers, declaring that the number of Ottoman subjects adopting foreign nationality had increased since 1863.³³

Generally speaking, the whole system of the capitulations began to be looked upon by the Ottoman Government as an obstacle to the progress and the preservation of the nation. In a memorandum, dated July 7, 1869, addressed to the representatives of the foreign powers, the Porte enumerated the abuses of the capitulations and declared that the Imperial Government could no longer tolerate the existing state of affairs.³⁴ In the meantime, the Ottoman Empire was in the process of disintegration, losing her prestige, decaying in power and efficiency. Under these

³² *Archives Diplomatiques*, 1867, p. 157.

³³ For text, see P. Arminjon, *op. cit.*, pp. 338-344; also, Testa, *op. cit.*, VII, 542.

³⁴ "Ces abus, il suffira de les signaler, pour que tout le monde comprenne qu'il serait impossible au Gouvernement Imperial de les tolérer plus longtemps.

"C'est pourquoi la Sublime Porte, en ordonnant aux autorités Imperiales d'observer strictement et en toute loyauté les dispositions contenus dans les capitulations, ne saurait trop leur recommander en même temps de repousser toute pretention qui dépasserait les limites des privileges consacrés par ces actes et qui porterait atteinte aux droits souverains et imprescriptibles de sa Majesté Imperiale le Sultan." (For text, see Aristarchy Bey, *Législation Ottomane*, II, 421-427. An extended discussion of this memorandum is found in B. Brunswik, *Études pratiques sur la question d'orient*, pp. 197-237.)

circumstances, Turkey could do little for herself, and the Powers showed no evidence of any desire on their part to do anything for her; their own interests, rather than Ottoman interests, dictated their policies towards the fate of the Turkish state.

LAW OF 1869 AND PROBLEM OF EXPATRIATION OF OTTOMAN SUBJECTS

Restrictive regulations issued by the Turkish Government added to the complexity of the situation. By an *Irade*, dated January 19, 1869,³⁵ the Porte forbade the naturalization of Turkish subjects under foreign governments. Article V of the proclamation strictly forbade the expatriation of Ottoman subjects without special authorization by the Imperial Government.³⁶ This gave rise to diplomatic controversies regarding the rights of Turkish subjects naturalized in foreign countries.³⁷ The consent of the

³⁵ For text, see *St. P.*, LXVII, 1251; the English version is found in *For. Rel.*, 1893, p. 714. See also, *infra*, pp. 113-115.

³⁶ "The Ottoman subject who has acquired a foreign nationality with the authorization of the Imperial Government is considered and treated as a foreign subject. If, on the contrary, he has naturalized himself as a foreigner without the preliminary authorization of the Imperial Government, his naturalization will be considered as null and void, and he will continue to be considered and treated in all respects as an Ottoman subject.

"No Ottoman subject can in any case acquire foreign naturalization until after obtaining an act of authorization delivered by virtue of an Imperial *Irade*."

³⁷ The status of a great number of Ottoman subjects who had acquired foreign nationality in Turkey under the protégé system (see *supra*, pp. 96 ff.) was another source of diplomatic controversy between Turkey and some of the foreign powers as the decree applied

Turkish Government to the expatriation of an Ottoman subject was given only on condition that the applicant should stipulate not to return or in case

to Ottoman subjects expatriated in the Ottoman Empire as well as to Turkish subjects naturalized in a foreign country. Thus the decree was opposed mostly by the powers who were particularly affected because of their having many Ottoman subjects in Turkey under their protection. Of these, Russia and Greece may be cited as examples. Their protest was based on the ground of the retroactive effects of the decree on capitulatory privileges. The Turkish Government, however, claimed that the law bore no retroactive effect since the Sublime Porte had never recognized the acquisition of a new nationality by Ottoman subjects. "There are persons," it declared, "who seem to believe that the law would have a retroactive effect because the Sublime Porte does not recognize the validity of changes of nationality abusively effected outside the presumptions of the laws of the countries which these new subjects had adopted. But the disposition of the law concerns only the Ottoman subjects whose change of nationality has been legally effected. The others have at no time been recognized." Accordingly, a decree was passed by which a special permanent commission attached to the Ministry of Foreign Affairs was instituted to concern itself with the determination of nationality and the execution of the law bearing thereon. (See G. Young, *op. cit.*, II, 238; also, Aristarchy Bey, *op. cit.*, I, 12.) Most of the powers accepted the regulations except Russia and Greece who continued their opposition to the law. (See E. R. Salem, "De l'autorité compétente pour statuer en Turquie sur les questions relative à la nationalité et des conflits de lois en matière de nationalité," *R. D. I Privé*, 1907, III, 25-42, 654-660.)

An agreement between Russia and Turkey was finally concluded May 4/16, 1870, (*St. P.*, 1884-1885, LXXVI, 594-595), modifying some of the previous arrangements of 1863 between the two countries (see *ibid.*, pp. 590-594). According to this new agreement of 1870, Turkey agreed to recognize the Russian nationality of Ottoman subjects who had obtained their Russian nationality before 1858 and whose names were found in the registers of the commissions instituted in the Ottoman Empire. The children of such persons, who in 1858 had not attained their majority, were also to be recognized as Russian nationals. However, persons who acquired a Russian passport after May 5, 1858, were to be admitted to avail themselves of the Rus-

he returned he should regard himself as an Ottoman subject.³⁸

To avoid this trouble, the British Government passed the naturalization act of 1870 which declared that "an alien to whom a certificate of naturalization is granted . . . shall not, within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, be deemed to be a British subject unless he has ceased to be a subject of that state in pursuance of the laws thereof or in pursuance of a treaty to that effect." Thus, a Turkish subject naturalized in Great Britain did not expect to receive British protection in case he returned to Turkey.³⁹ There were also other countries, of which France was an example, which did not admit a Turkish subject to citizenship unless he procured the Imperial sanction of his change of nationality.⁴⁰ No laws in the United States, however, could give a free hand to the Ameri-

sian nationality after making a declaration and after residing three years in Russia.

Greece continued to maintain its own pretension, but the Turkish Government insisted on the view that Turkey had the exclusive right to set its own regulations regarding the acquisition and the loss of nationality of its own subjects. The question remained unsolved until the elaboration of the consular convention drawn by the arbitration of the ambassadors, although the provisions of this convention did not touch on the question of nationality. (On this convention and the Greek capitulations in general, see: *R. G. D. I. P.*, 1902, IX, 202-262, 406-468; *ibid.*, 1903, X 69-105; *St. P.*, 1901-1902, XCV, 939-948; *R. D. I. L. C.*, 1897, XXIX, 377-384.)

³⁸ *For. Rel.*, 1901, p. 516.

³⁹ *For. Rel.*, 1894, p. 762.

⁴⁰ Hall, *International Law*, London, 1895, p. 247.

can Government to resort to such measures, and, consequently, the solution of the problem of expatriation became largely dependent on an understanding to be reached between the Governments of the United States and of Turkey.⁴¹ Unfortunately, no such an understanding was ever reached between the two countries and the problem was left unsolved.⁴² There is record of several cases of expulsion from Turkey of naturalized American citizens of Armenian parentage whereby the Ottoman government refused to recognize the right to American protection.⁴³

IMMIGRATION OF JEWS INTO PALESTINE

Among other Turkish regulations relative to nationality was that preventing the immigration into Palestine of Jews *en masse* who wished to establish permanent colonies there; the sojourn of Jewish

⁴¹ A detailed account of the controversy arising from the problem of expatriation of Ottoman subjects is found in Moore's *Digest of International Law*, III, 679-708.

⁴² In his annual message (December 5, 1899), President McKinley said: "In the Turkish Empire the situation of our citizens remains unsatisfactory. Our efforts during nearly forty years to bring about a convention of naturalization seem to be on the brink of final failure through the announced policy of the Ottoman Porte to refuse recognition of the alien status of native Turkish subjects naturalized abroad since 1869. Our statutes do not allow this Government to admit any distinction between the treatment of native and naturalized Americans abroad, so that ceaseless controversy arises in cases where persons owing in the eyes of international law a dual allegiance are prevented from entering Turkey or are expelled after entrance." (*For. Rel.*, 1899, p. xxxi.)

⁴³ See *North American Review*, 1906, CLXXXII, 696-699.

travelers in Palestine was limited to three months. Furthermore, Jews who purchased real estate in Palestine were required to subscribe to special agreements. The British Government protested against these restrictions;⁴⁴ and so did the American,⁴⁵ on the ground that no distinctions could be introduced regarding the protection of their nationals and the issuance of passports.⁴⁶

OTTOMAN SUBJECTS NATURALIZED IN FOREIGN COUNTRIES
AND THE RIGHT TO HOLD REAL ESTATE IN TURKEY

In connection with the problem of expatriation, arose the question of the rights of Ottoman subjects naturalized in foreign countries to hold and inherit real estate in Turkey. According to the Imperial rescript of January 18, 1867, granting to foreigners the right to possess real estate in Turkey,⁴⁷ Ottoman subjects naturalized in foreign countries were not entitled to the rights conferred upon the nationals of the country in which they were naturalized.⁴⁸ "This arrangement (relative to the rights

⁴⁴ *For. Rel.*, part 2, 1888, p. 1590.

⁴⁵ See *For. Rel.*, part 2, 1888, pp. 1617, 1627; *ibid.*, 1894, pp. 752-764; *ibid.*, 1898, pp. 1092, 1107.

⁴⁶ See Hinckley, *American Consular Jurisdiction in the Orient*, p. 80.

⁴⁷ Cf. p. 81 et seq., *supra*. Also Appendix II.

⁴⁸ "A Turk who has, since 1869, been naturalized abroad without having obtained an Imperial Iradé consenting to his expatriation," says Mr. Moore, "is debarred from inheriting from Ottoman subjects, notwithstanding that the property may have been acquired through his thrift and industry; and, in case he purchases property in Turkey, he can bequeath it only to such subjects." (*Digest of International Law*, III, 692.)

of foreigners to hold real estate in Turkey),” reads the rescript, “ does not concern subjects of Ottoman birth who have changed their nationality, who shall be governed in this matter by a special law.” The Ottoman Government assumed that the special law referred to is that of April 21, 1858, relative to real estate, article CXI of which provides that “ land once owned by a Turkish subject who has abandoned his nationality does not descend to his children.”⁴⁹ It is to be noted, in this connection, that there was no treaty stipulation between Turkey and the United States to prevent the application of this rule to Ottoman subjects who had since 1869 become citizens of the United States without the consent of the Turkish Government.⁵⁰

UNRATIFIED TURKISH-AMERICAN TREATY OF
NATURALIZATION OF 1874

In 1874 a treaty of naturalization was negotiated between the United States and Turkey and was signed in Constantinople on August 11 of the same year.⁵¹ In regard to the renunciation of acquired citizenship, this convention, as signed, provides that the intention not to return to the country of adoption *shall* be considered as established by a two

⁴⁹ *For. Rel.*, 1897, p. 588; also, *ibid.*, 1883, pp. 809, 815, 821, and 1906, pp. 1410-1412.

⁵⁰ The Turkish Government did not seem to have insisted upon the enforcement of the provision in the code of 1858. (See Hinckley, *op. cit.*, p. 97.)

⁵¹ For text, see G. Noradounghian, *Recueil d'actes Internationaux de l'empire ottoman*, III, 368-370.

years' residence in the country of origin. The Senate of the United States amended the treaty by substituting the word "may" for "shall" which is the usual form found in the treaties of the United States.⁵² The Ottoman Government accepted the amendment with certain qualifications which in effect restored the original meaning. Ratifications were exchanged at Constantinople (April 22, 1875), but on account of the qualification made by the Turkish Government the President of the United States considered the exchange as ineffective and refused to proclaim the treaty. Fourteen years later, Mr. Straus, minister of the United States at Constantinople, obtained the consent of the Sultan to accept the treaty as amended by the Senate without qualification. Thus the treaty was to take effect on its proclamation by the President; but the President resubmitted it to the Senate, and by its resolution of February 28, 1889, the Senate consented to the exchange of ratifications upon an understanding between the two governments "that as amended the treaty shall not be construed to apply to persons already naturalized in either country." The ratifications, however, remained unexchanged.

CONCLUSION

Such was the capitulatory system in Turkey—a system which may be characterized as a domain of conflict. There is no doubt that the abuses of the

⁵² Noradounghian, *op. cit.*, III, 381-382.

capitulatory rights on the part of some of the foreign powers helped to aggravate the situation. Thus, it may seem unfair to attribute the difficulty involved in the solution of the question to the nature of the Turkish system of justice, for there is no evidence that the Western Powers were ever sincerely desirous of cooperating in the introduction of any measures to better the situation. But, on the contrary, most of the powers used the advantage of this anomalous condition to increase their privileges and to satisfy their political and economic interests.⁵³

The capitulations, after all that can be said, were, however, a paramount impetus in urging the Ottoman Government to secularize its laws, and it is not an unwarranted conclusion that as the Romans were influenced by their contact with the foreign elements in their midst to incorporate the *ius gentium* into their legal system, so was the Ottoman administration influenced by the contact with European jurisprudence. This is manifested in the present attempt, on the part of Modern Turkey, to sift the religious elements from the departments of state and justice and to establish a modern system which may prove of great advantage to Turkey and to the foreign powers as well.

⁵³ "The Turkish Government, I know, have been accused of being corrupt. I venture to submit that it has not been for want of encouragement from Europeans that the Turks have been corrupt." (Sir Mark Sykes, in the House of Commons, March 18, 1914.)

CHAPTER VI

NATIONALITY AND DOMICILE

NATIONALITY IN TURKEY AND THE LAW OF 1869

Under the capitulatory system in Turkey, no foreigners, whether temporary residents, permanently located, or born in Turkey, were allowed to become Ottoman citizens without becoming Moslems until 1869 when a law with respect to naturalization was passed by the Sublime Porte.¹ Nationality was so blended with religion that little difference was deemed to exist between the two.² So it was not unusual for foreign subjects born in the Ottoman

¹ This is the same law which forbade the naturalization of Turkish subjects under foreign governments without special authorization by the Imperial Government. (See *supra*, p. 105, the text and a documented explanation thereof are given in G. Young, *Corps de droit ottoman*, II, 225-229.)

² It was provided by the French capitulation of 1740 (Nora-dounghian, *op. cit.*, I, 294, art. 68) that if a Frenchman should willingly embrace Mohammedanism, he would be required to give notice to his consul and by doing this he would relinquish his nationality. Also in the British capitulation of 1675 (art. 61) it was provided "that if any Englishman should turn Turk (the word Turk is used here as a synonym of Moslem), and it should be represented and proved that besides his own goods, he has in his hands any property belonging to another person in England, such property shall be taken from him, and delivered up to the Ambassador or Consul, that they may convey the same to the owner thereof." (Hertslet, *Commercial Treaties*, II, 366; see also art. 71, *ibid.*, p. 368.) The word "Turk" was also used as a synonym of "Mohammedan" in the French capitulation of 1535. (See art. 6, appendix I.)

Empire beyond several generations to be regarded as subjects of the state to which their ancestors had belonged. "I assent after careful examination," says Sir Edwin Pears, "that uninterrupted usage has kept all the descendants of British-born or other foreign subjects in the ligeance of the sovereign of the country from which the ancestor came as completely as if they had been born on the proper territory of such sovereign."³

According to the Turkish law of nationality of January 19, 1869,⁴ a foreigner could become an Ottoman citizen if he had been residing in Turkey for five years after attaining majority.⁵ The children of a foreigner who had been naturalized in Turkey, however, did not follow the condition of the naturalized father but remained foreigners before the law; these could claim Turkish citizenship three years after attaining majority. Similarly, the children of an Ottoman subject naturalized in a foreign

³ *Law Quarterly Review*, October, 1905, XXI, 418.

⁴ The text of the law is also found in P. Arminjon, *Étrangers et protégés dans l'empire ottoman*, p. 330; Aristarchy Bey, *Legislation ottomane*, I, 7; Testa, *Recueil des traités de la Porte ottomane*, VII, 526; and Hertslet, *Commercial treaties*, XV, 1067-1068.

In connection with the law, a circular dated March 26, 1869, was also issued bearing comment on the law serving as a guide to the governors-general of the villayets in the Empire. (For text, see: Aristarchy Bey, *op. cit.*, I, 9-11; *For. Rel.*, 1893, pp. 714-715; *St. P.*, LXX, 720-722.)

⁵ "Every foreigner who attained majority and who has resided for five years consecutively in the Ottoman Empire may obtain the Ottoman nationality by applying directly or through an intermediary to the Minister of Foreign Affairs."

country did not, according to the law, follow the condition of the father but remained Ottoman subjects.⁶ Hence birth on Turkish soil did not give the right of Ottoman citizenship.⁷

FOREIGN LAWS ON NATIONALITY AND THE FOREIGNER
IN TURKEY

In no capitulation had the legal status of the children of foreigners born on Turkish territory been defined. The original idea had been to continue to have a colony preserving its nationality similar to the colonies organized by the early Genoese, Vene-

⁶ "The minor child of an Ottoman subject who has been naturalized in a foreign country or who has lost his nationality does not follow the condition of his father and remains Ottoman subject. The minor child of a foreigner who has been naturalized in Turkey does not follow the condition of his father and remains foreigner."

⁷ The new Turkish law of nationality of 1928, promulgated by the New Turkish Republic, provides that children born in Turkey are Turkish subjects. Such children, however, may within six months after reaching majority (in Turkey the nineteenth birthday) opt for the nationality of the parents in which case they will not be allowed to remain in Turkey. (See *London Times*, June 14, 1928, p. 15.) The provision as first interpreted to hold that any child born on Turkish soil after January 1, 1929, of foreign parents, either of whom had been born in Turkey, will be considered a Turkish subject was later reinterpreted by the Turkish Government such as to postpone the application of the law for a generation. "Only children born in Turkey of foreign parents, either of whom shall have been born in Turkey on or after January 1, 1929, will become Turkish subjects." (See *Cur. Hist.*, June, 1929, XXX, 535.) On the new Turkish law of nationality, see E. R. Salem, "La loi nouvelle sur la nationalité turque, avec quelques notes comparatives de droit étranger," *R. D. I. privé*, 1929, XXIV, 25-59; see also, *Revue de l'institut Belge de droit comparé*, 1928, p. 219 and *Rivista di Diritto internazionale*, 1928, IV, 556.

tians, and other foreign nationals in the Byzantine Empire. Thus, for centuries, the descendants of foreigners in Turkey remained under the control and the protection of their own sovereign.⁸ This may seem to have caused a contradictory view with enactments of some countries. According to the English statutes of George II and George III, for instance, British subjects born abroad beyond the third generation were to be regarded as aliens. This, however, could not be applied to British subjects residing in Turkey; for foreigners, as we have seen, could not become Ottoman subjects until the enactment of the law of nationality of 1869. It was later construed in several British cases that a Britisher could not acquire a domicile of choice in a country where the capitulatory system operated.⁹

The law of the United States limited the right of citizenship of American nationals born abroad to one generation,¹⁰ although it provided for the acqui-

⁸ "Neither Sultan nor king," remarks Sir Edwin Pears, "contemplated the application of the new territorial idea of allegiance, which made allegiance depend on the place of a person's birth, but were content, as were all other European sovereigns of the time, to remain with the old notion that allegiance was due to the person of the sovereign under whose control and within whose protection he was born." (See *Law Quarterly Review*, October, 1905, XXI, 410.)

⁹ See *infra*, p. 119 et seq.

¹⁰ "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States." (*Rev. St.*, sec. 1993 [U. S. Comp. St. sec. 3967; U. S. C. tit. 8, sec. 6].)

sition of citizenship by descendants affected by this limitation through the American consulate after having complied with certain modes of procedure.¹¹ This law, however, was not strictly applied to American nationals residing in Turkey; exceptions were made in favor of those who continued to associate with their fellow Americans. In the case of David and John Offley, children of the second generation born on Turkish soil, the Department of State maintained that they retained their citizenship. In a note dated August 9, 1887, the Department of State declared that "section 1993 of the Revised Statutes, providing that 'the rights of citizenship shall not descend to children whose fathers never resided in the United States,' does not apply to the descendants of citizens of the United States members of such communities. Such descendants are to be regarded, through their inherited extra-territorial rights recognized by Turkey herself, as born and continuing in the jurisdiction of the United States."¹² Thus American missionaries applying for passports to countries where the exterritorial system operated were not asked whether they intended to reside there or return to the United States.¹³

¹¹ 34 Stat. 1229, sec. 6 (U. S. Comp. St. sec. 3963; U. S. C. tit. 8, sec. 6).

¹² *For. Rel.*, 1887, p. 1125.

¹³ In a note, dated July 18, 1892, the Department of State maintained that "these requirements, while generally applicable to the cases of native-born citizens indefinitely sojourned abroad under circumstances creating a presumption of abandonment of their Ameri-

There was no such limitation in French law. Children of French parentage born anywhere abroad have always been regarded as French citizens.¹⁴ This, most probably, has its origin in the attempt made on the part of the French kings during the seventeenth and the eighteenth centuries to control French communities established in the Orient; these communities which were called "nations" were entirely controlled by royal edicts, and children born therein were regarded as if they were born on French soil.¹⁵

can domicile and status, are particularly necessary in respect to naturalized citizens quitting this country after acquiring citizenship, and especially to such as take up residence in the land of their original allegiance. The case of an American missionary in a country where the United States possesses extra-territorial jurisdiction presents certain exceptional features which may well invite relaxation of requirements not obviously necessary in their regard." (*For. Rel.*, 1892, p. 124.)

¹⁴ The Code Napoleon and the law of 1889 regarded such children as French nationals unless they lost it, either by serving in the army of the foreign country in which they were born or by some other act which might be construed as denoting renunciation of the citizenship of the parents. The new French code of nationality of August 10, 1927, however, provides that a child born of French parents in a country whose laws rest on the doctrine of *jus soli*, imposing its own nationality on the child, shall be regarded as having acquired the nationality of such country. (For the text of this new law, see *Chunet*, 1927, LIV, 1213-1259; see also, *A. J. I. L.*, April, 1928, XXII, 379-382.)

¹⁵ The "nation" was highly centralized and its members could not even marry without a royal sanction. Those who would marry without the permission of the king were to be ordered out and to be denied residence in the Levant as members of these French communities (see art. 24 of the ordinance of March 3, 1781, De Clercq et De Vallat, *Formulaire des Chancelleries diplomatiques et consulaires*, 6th edition, 1890, II, 18). The chief royal ordinances regulat-

ACQUISITION OF TURKISH DOMICILE BY FOREIGNERS

The question as to whether or not a foreigner could acquire a domicile of choice in Turkey and a discussion thereof can best be approached through a brief survey of the opinions of the higher courts.¹⁶ The early English cases uniformly held that no such domicile could be acquired in a country where extra-territorial privileges were granted to foreigners;¹⁷ the foreigner was to keep his domicile of origin no matter how long he resided within the territory of the servient state.¹⁸ This opinion was uniformly shared by most writers of the old school. In his report on the capitulations, Van Dyck asserted that "a European resident in Turkey continues to belong to his own country and has his domicile there, for his domicile is considered to be that of the consul in authority over him; and it is the judge of this domicile who exercises full jurisdiction over him, and through whom his estate or his heritage is ad-

ing the political and social organization of the "nation" were those of August, 1681, and of March 3, 1781 (see *supra*, p. 59). For an account of the organization and the constitutional administration of these "nations," see: Pélissié du Rausas, *Le régime des capitulations dans l'empire ottoman*, I, 390-404; Ancien Diplomate, *Le régime des capitulations*, p. 216; Clerck, J. de, *Guide pratique des consulats*, I, 328 et seq.

¹⁶ An elaborate treatment of the subject is found in Francis Pigott, *Exterritoriality*, pp. 216-235.

¹⁷ See Hall, W. E., *A Treatise on the Foreign Powers and Jurisdiction of the British Crown*, pp. 180-186.

¹⁸ Cf. H. W. Halleck, *International Law*, San Francisco, 1861, pp. 713-714.

ministered. . . . For, although dwelling there, they (foreigners) are nevertheless not subject or amenable to the laws of the land, and are governed by the laws of their home country, so that, viewed juridically, they can be deemed as being quite outside of Ottoman territory.”¹⁹

EARLY DECISIONS

In *Maltass v. Maltass* (1844),²⁰ the question arose as to whether the law of Turkey or the law of England should be applied in the disposal of the property of a British subject who was born in Smyrna and who resided there all the time with the exception of a few years spent in England. The Treaty of Dardanelles (1809) recognizing the power to make a will with no regard to domicile rendered the question of domicile immaterial; thus Dr. Lushington, sitting for Sir II. Jenner Fust, maintained that “it was immaterial whether he had acquired a domicile in Smyrna or retained his English domicile, as in either case the English law would apply, . . . but this I must say—I think that every presumption is against the intention of British Christian subjects voluntarily becoming domiciled in the dominions of the Porte.”

In *Re Tootal's Trust* (1883),²¹ this opinion was affirmed. The question in this case was brought up as

¹⁹ *Sen. Ex. Doc.* No. 87 (vol. IV), 47th Cong., 1st sess., pp. 17, 18.

²⁰ 1 Rob. Eccl. (1844), 67. For the facts of the case, cf. S. C. (1842) 3 Curt. 231.

²¹ 23 Ch. Divs., 1883, pp. 532-542; see also, *Clunet*, 1884, II, 85.

to whether or not a British subject residing in Shanghai could acquire a domicile in China. It arose in connection with the payment of legacy duty; if a British subject residing in Shanghai and dying there could acquire a domicile in China the duty would not be payable, whereas the duty would be payable if the domicile were English. It was decided that a Britisher could not acquire a domicile in China. In delivering the opinion of the court, Judge J. Chitty explained the status of the Anglo-Indian domicile and asserted that British subjects residing in China could not acquire there a domicile similar to the Anglo-Indian domicile.²²

While recognizing this same principle, the case of *Abd-ul-Messih v. Farra* (1887) ²³ established, on the other hand, the principle that a person under British protection, residing in Egypt, does not become a British subject and that mere protection does not render English law applicable to his succession.

THEORY OF DELEGATION

As the principle of “personality of law” was gradually superseded by the modern concept of territorial sovereignty, the theories expounded in these early decisions were found to be lacking in harmony with the latest thought. Thus grew the theory of delegation by which the officials of the foreign sov-

²² See *Law Quarterly Review*, 1908, XXIV, 443.

²³ 13 App. Cas., 1888 (P. C.), 431; see also, *Clunet*, 1892, XIX, 758-761.

foreign exercising judicial authority within the territory of a servient state were held to be acting as agents of the sovereign on whose territory the foreign judicial authority is exercised.²⁴ In *Re Ross* (1890),²⁵ the Supreme Court of the United States maintained that the consular courts in Japan operated as agents of the Japanese Government. In delivering the opinion of the Court, Justice Field asserted that "the constitution can have no operation in another country. When, therefore, the representatives or officers of our Government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other."

In *Secretary of State for Foreign Affairs v. Charlesworth Pilling and Co.* (1901),²⁶ it was held that "the Queen and her officers are acting as Zanzibar authorities by virtue of the power which she has

²⁴ "This theory," says Mr. Hinckley, "is, in a word, that of agency: A consul in Turkey or China exercises jurisdiction as an agent of Turkey or China; the source of his authority as a judge is not the United States, but the Oriental Power, which has, through treaty stipulation or long standing usage, made the grant of jurisdiction; the laws and regulations provided by the American Government for controlling the exercise of consular jurisdiction are virtually provided in behalf of the Oriental Government." (F. E. Hinckley, *American Consular Jurisdiction in the Orient*, pp. 66-67.)

²⁵ United States Supreme Court, 1890, 140 U. S. 453, 11 Sup. Ct. 897, 35 L. Ed. 581. Also, J. B. Scott, *Cases on International Law*, St. Paul, 1922, pp. 379-386.

²⁶ L. R. (1901), A. C., p. 373; see also, F. Piggott, *Exterritoriality*, p. 5 and *The British Year Book of International Law*, 1926, p. 132.

acquired and which is within its limits a sovereign power. It results that a judge acting within these limits is a Zanzibar judge.”²⁷

It seems that the chief contribution of this theory of delegation was to make the system of the capitulations look as if effecting no derogation of Turkish sovereignty. It would seem as if the right to grant capitulatory privileges to foreign nations flowed from Turkish sovereignty and treaty making power, since the concessions were granted under international treaties by which Turkey voluntarily agreed to allow foreign courts to sit on Turkish soil; but, in fact, it is to be noted that the capitulations as they existed during the few decades preceding the World War were practically imposed upon Turkey by European pressure. They were forced upon the Ottoman Government which used every method and procedure

²⁷ Dr. Thornely contends that there is a particular difficulty in accepting the delegation theory. He declares that while a sovereign is made an agent of another sovereign the power of pardon which is one great power inherent in the real sovereign cannot be exercised by the delegating sovereign. He maintains that a Britisher convicted in a British consular court or transferred to a home jail cannot be released by the native sovereign; the power of pardon, he asserts, belongs to the agent only which is the British sovereign. (Cf. *The British Year Book of International Law*, 1926, pp. 133-134.)

It may be questioned, however, whether this power of pardon could not be considered as an integral part of the judicial authority granted by the native sovereign, “It may be argued,” says Mr. Thayer, “that when a state gives to a foreign power the exercise of sovereign rights within its territorial confines, it is an absolute and unconditional grant of such rights which the grantor may not thereafter exercise himself unless the grantee consents or cuts off his rights by a reconveyance.” (See *A. J. I. L.*, 1923, XVII, 226.)

it could think of to rid itself of the system, but with no avail. Furthermore, the grant was unilateral. Although international in character, the treaties under which the grants were made were unequal. In this respect, it can hardly be denied that the capitulations, in practice, imposed grave limitations on the sovereign rights of Turkey. The doctrine of delegation saved Turkey, at least in theory, from the implication of a limited sovereignty, but there is ample evidence that the capitulations deprived the Ottoman Government of full freedom of action within the sphere of its domain.

LATER DECISIONS ON DOMICILE

Then followed cases in which the early decisions declaring the impossibility of a foreigner's acquiring a Turkish domicile were criticized, especially the decision of the Tootal's Trusts case. It was maintained in *Re Allen's case* (1907) that Dr. Allen, an American citizen who moved to China where he lived for forty years until his death, had *ipso facto* acquired an extra-territorial domicile in China. "We can see no good reason," said Judge Wilfley, "for holding that a citizen of the United States cannot be domiciled in China. Mr. Justice Chitty's decision (Tootal's Trusts case) destroys in their application to China all the definitions of domicile contained in the books. It ignores both of the essential elements of residence and intention."²⁸

²⁸ See *A. J. I. L.*, part 1, 1907, I, 1029-1039; also, *Law Quarterly Review*, XXIV, 445-447.

In another American case, *Mather v. Cunningham* (1909), it was asserted that the "whole trend of modern authority is in opposition to the dictum advanced in *Re Tootal's Trusts*." The court concluded that "domicil depends upon locality, and that the law of the locality attaches to the person who has acquired a domicil there, whether that law be decreed by the supreme power of the foreign country or is the result of treaty."²⁹

This opinion was later adopted by the House of Lords in 1918. The case of *Casdagli v. Casdagli*³⁰ marks the turning point in the history of British jurisdiction. In delivering the opinion of the court, Lord L. C. Finlay declared that the appellant's position "is in no respect analogous to that of an ambassador and his staff in a foreign country. . . . The jurisdiction exercised by His Majesty in Egypt is indeed extraterritorial, but it is exercised with the consent of the Egyptian Government, and its jurisdiction is therefore, for the purpose, really part of the law of Egypt affecting foreigners there resident."³¹

TERRITORIAL SOVEREIGNTY VERSUS PERSONALITY OF LAW

The medieval idea that law is personal gave way to the modern theory of territorial sovereignty. Law used to be personal irrespective of territory, whereas

²⁹ *A. J. I. L.*, 1910, IV, 446-467; also, 74 *Atlantic Reporter*, p. 809.

³⁰ *Law Reports* (1919) A. C. 145.

³¹ See *A. J. I. L.*, 1926, XX, 290.

the modern idea of the state and its judicial authority is intimately associated with territory. The so often quoted passage of Judge Marshall with regard to the territorial sovereignty of the state is in harmony with modern thought and modern political theories. "The jurisdiction of the nation within its territory," Judge Marshall remarked, "is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself."³² The modern state, therefore, must have well-defined territory over which she has the right of exclusive jurisdiction.³³ A part of this right may be waived under certain exceptions only by the consent of the state itself which may be implied or expressed.

This new doctrine makes domicile attached to locality rather than to society. It recognizes the application of a foreign legal system in countries granting extraterritorial privileges, but it acknowledges, at the same time, the idea that foreign laws

³² *Schooner Exchange v. McFaddon*, 7 Cranch, 1812, p. 116, 3 L. Ed. 287. Also, Scott, *Cases on International Law*, p. 300.

³³ It is to be noted, in this connection, that most continental writers maintain that the territorial sovereign can by no means have absolute power and jurisdiction over foreigners within his domain. They hold that foreigners are to be allowed to enjoy the advantages of their own laws in so far as these laws are not opposed to the public order and the laws of the state. "Each sovereign," says Pillet, "should tolerate on its territory the application of foreign laws to the extent that said application serves the common advantage of nations. . . . It is therefore certain that the state has not the same freedom of action towards the foreigner that it possesses towards a national." (Pillet, *Principes de droit international privé*, edition 1903, pp. 53, 196.)

are operative because they are legally recognized by these countries as forming a part of the law of their land. And, finally, it is to be noted that in accordance with this new doctrine, the American Government, contrary to the instructions of the Department of State of August 9, 1887,³⁴ providing that children born abroad beyond one generation of American parents residing in Turkey shall not lose the right of citizenship if they continue to associate with their fellow Americans, declared that persons born in Turkey whose fathers had never resided in the United States "are not citizens of the United States, even though their fathers may have resided in American communities and submitted to the extraterritorial jurisdiction of the United States."³⁵

³⁴ See *supra*, p. 117.

³⁵ *For. Rel.*, 1914, pp. 15-16.

CHAPTER VII

AMERICANS IN TURKEY

EARLY AMERICAN INTERESTS IN TURKEY

The United States as an independent state is the creation of the eighteenth century, and as such, it was the last among the western powers to develop interests in the Ottoman Empire. It was not until 1800 that the American flag was for the first time displayed before the walls of Constantinople on the American frigate *George Washington*,¹ and not until 1826 that the first American merchant steamer was on the waters of the Bosphorus.²

American interests in Turkey, however, may be traced back to the colonial days when the port of Smyrna was the center of attraction to American ships. Mr. Ravndal calls attention to the fact that in the latter part of the colonial period Bostonians carried out trade with the Near East and a little colony of American merchants was established in

¹ This vessel had not been intentionally destined for Constantinople; it was seized by the Dey of Algiers and forced to carry an Algerian ambassador to Constantinople. (See Eugene Schuyler, *American Diplomacy*, N. Y., 1901, p. 221.)

² Ravndal, "The Origin of the Capitulations, etc.," pp. 97-99. According to an official report, however, the brig *Calumet* of Boston went as far as the Black Sea in 1810. (See "Turkey," *U. S. Department of Commerce, Trade Promotion Series*, No. 28, p. 229.)

Smyrna, remnants of which still exist.³ These commercial relations grew up gradually during the early years of the American national existence, and a few decades thereafter the need for official American representation in the Ottoman Empire became more pronounced.⁴

Early American commerce in the Ottoman Empire had been protected by the English Levant Company (1581-1825) which had, more or less, an exclusive monopoly over Turkish markets. For this protection, "a consulate duty, averaging one and one-fourth per cent on the values of cargoes inward and outward, is paid."⁵

EARLY NEGOTIATIONS OF A TREATY WITH THE PORTE

The growth of the need for American protection of American citizens in Turkey pressed upon the administration to negotiate with the Ottoman Government for a commercial convention which would define Turkish-American relations. As early as 1799, a mission was appointed by President Adams upon which full authority was conferred to negotiate a

³ Ravndal, G. B., "American Trade Relations with the Near East," p. 7.

⁴ From August, 1811, to November, 1820, exclusive of the period of the War of 1812, thirteen American vessels, on the average, arrived annually at the port of Smyrna. The value of their cargoes for each year was estimated to be upward of a million dollars. During the year 1831, there were 27 vessels and 300 men employed by the commerce of Smyrna with the United States. (See "Turkey," *U. S. Department of Commerce, Trade Promotion Series* No. 28, p. 229.)

⁵ Van Dyck, "Report on the Capitulations," p. 19.

treaty of amity and commerce with the Sublime Porte; ⁶ nothing, however, came of it, and no further steps were taken until 1820, when the Bradish-Bainbridge mission was appointed to continue the negotiations started in 1799. This again with two other missions sent in 1823 and in 1828 proved a failure. The attempt to conclude a treaty with Turkey was renewed in 1829 when President Jackson commissioned Charles Rhind, David Offley and Commodore James Biddle to resume negotiations with the Ottoman Government.⁷ Consequently, a treaty was signed on May 7, 1830,⁸ and David Porter of Maryland was commissioned on April 15, 1831, chargé d'affaires of the American legation ⁹ which opened in that year in Constantinople.¹⁰

THE TREATY OF MAY, 1830

Generally speaking, the treaty of 1830—a rather laconic document—left it for the most favored nation clause inserted therein to determine most of the

⁶ William Smith, then minister plenipotentiary to Portugal, was commissioned on February 11, 1799, envoy extraordinary and minister plenipotentiary to Turkey but did not go. (*The Americana*, 1927, XXVII, 195.)

⁷ See House Ex. Doc. No. 250 (vol. VI), 22d Cong., 1st sess.; also, Sen. Ex. Doc. No. 200 (vol. III), 25th Cong., 3d sess.

⁸ Ratifications were exchanged October 5, 1831, and the treaty was proclaimed February 4, 1832.

⁹ Commissioned later as minister resident on March 3, 1839.

¹⁰ It was not until 1867 that the first Turkish diplomatic representative, Blacque Bey, was accredited as envoy extraordinary and minister plenipotentiary to the United States. (*The Americana*, 1927, XXVII, 195.)

American rights in Turkey. The capitulatory régime which involved written and unwritten privileges had been already established for centuries when the increasing number of American nationals together with the development of American interests in Turkey necessitated treaty relations. Thus, according to this first treaty, American nationals could claim any privilege granted by Turkey to other foreign nationals. It is interesting to note, in this connection, that the most important privilege, the exemption from Turkish jurisdiction in both civil and criminal cases involving foreigners only, whether of the same nationality or of different nationalities, was not explicitly granted under the terms of this treaty.

The treaty, consisting of nine articles, dealt mostly with trading rights and bound each of the two countries to offer most-favored nation treatment to the other. The fourth article, which has been the source of diplomatic controversy for more than a half century, restricted the Turkish courts from giving a judgment on a dispute between a Turk and an American without the presence of a dragoman and bound the Turkish authorities to disallow the arrest of an American citizen by local officials, even if the latter had committed a crime justifying his arrest. The last provision reads as follows:

Citizens of the United States of America quietly pursuing their commerce, and not being charged or convicted of any crime or offence, shall not be molested; and even when they may have committed some offence *they shall not be arrested* and put in prison by the local authorities, but *they shall be*

tried by their minister or consul, and punished according to their offence, following, in this respect, the usage observed towards other Franks.

A bitter dispute arose as to the real translation of this provision and remained the subject of diplomatic correspondence for more than fifty years without any satisfactory settlement. Turkey contended that the words "they shall not be arrested" and "they shall be tried by their minister or consul, and punished according to their offence" were not found in the Turkish version.¹¹ The treaty also dealt with the mutual recognition of consular representation and with the most-favored nation treatment to

¹¹ For references on the conflicting versions of the treaty, see: Curtis, W. E., *The United States and Foreign Powers*, N. Y., 1899, pp. 239-242; *For. Rel.*, 1900, pp. 559, 914; *ibid.*, 1885, p. 892; Hinckley, F., *American Consular Jurisdiction in the Orient*, pp. 23-27; House Ex. Doc. 303 (vol. VI), 22d Cong., 1st sess; Hyde C. C., *International Law chiefly as interpreted and applied by the United States*, Boston, 1922, I, 458; Lawrence, W. B., *Commentaire sur les éléments du droit international*, IV, 158 et seq.; Mandelstam, *La Justice ottomane dans ses rapports avec les puissances étrangères*, pp. 154-174; Moore, *International Law Digest*, II, 668-714; E. Schuyler, *American Diplomacy*, N. Y., 1901, p. 62; Turlington, W. E., "The American Treaty of Lausanne," *World Peace Foundation Pamphlets*, 1924, VII, No. 10, p. 567; ———, "Treaty Relations with Turkey," *Yale Law Journal*, 1925-1926, XXV, 329; F. Wharton, *A Digest of the International Law of the United States*, 2d edition, II, sec. 165, pp. 292-304.

In general, however, foreigners committing crime in Turkey were tried by the Ottoman courts in the presence of the dragoman even when their plaintiffs were Ottoman subjects; but in capital cases or even when the criminal was condemned to a long imprisonment the criminal was handed over to his own legation for the execution of the judgment. (See *House Ex. Doc.* 68, 35th Cong., 2d sess., pp. 61-67; also, *supra*, pp. 80, 84-85.)

American merchant vessels, mainly concerning the passage through the canal of the Imperial residence. An interesting provision was added to the effect that the American representatives were not to lend protection to Turkish subjects of the Christian faith.¹²

To sum up, it may be said that the treaty of 1830 was of great significance in that it was the first formal treaty of commerce and navigation between the United States and Turkey which laid a basis for future Turkish-American relationships. It seems clear when we read the preamble of the instrument that there was no definite period within which the treaty might come to an end. This point is important; for when Turkey abrogated the capitulations in 1914 by unilateral act, it is partly on this point, as we shall see later, that the American Government based its refusal to recognize the right of terminating the obligations under the terms of the treaty. It was claimed that the treaty was contractual and indefinite, and neither party, therefore, could terminate it without the consent of the other.¹³ Similarly after the World War, the American Government refused to give its formal recognition to the abolition of the capitulations despite the formal

¹² For the text of the treaty, see *Malloy*, II, 1318-1320; also, Noradounghian, G., *Recueil d'actes internationaux de l'empire ottoman*, II, 192-194.

In the original text a secret clause was added providing for the purchase of timber and the building of ships in the United States. This was rejected by the American senate on account of its secret character.

¹³ See *infra*, p. 191.

renunciation of the capitulatory rights by the European powers in 1923. It was contended that the United States had not declared war on Turkey and that the treaty of 1830 granting capitulatory rights could not be terminated without the consent of the American Government.¹⁴

THE TREATY OF FEBRUARY 25, 1862

With the view to regulating the details of Turco-American commercial relations, a treaty of commerce and navigation was concluded on February 25, 1862.¹⁵ Up to the date of this new treaty, the United States had depended largely on commercial agreements reached between Turkey and the European Powers in determining her trade relations with the Ottoman Empire; the commerce of the United States had been carried on the same footing as that on which the commerce of Great Britain was placed according to the commercial convention of August 17, 1838, concluded between the latter and the Sublime Porte.¹⁶ The American treaty of 1862 was, therefore, a substitute for the Anglo-Turkish convention of 1838.¹⁷

The treaty provided: First, that all commodities imported into the Ottoman Empire by American mer-

¹⁴ See *infra*, pp. 272-273.

¹⁵ The treaty was ratified by the President of the United States on April 18, 1862; ratifications were exchanged on June 5, 1862, and proclamation was made on July 2, 1862.

¹⁶ For the text of the Anglo-Turkish treaty of August 17, 1838, see Noradounghian, *op. cit.*, II, 249-253.

¹⁷ For text, see *Malloy*, II, 1321-1341.

chants, as well as all merchandise exported by them from the United States to Turkey, were to pay a tariff duty of eight per cent *ad valorem* or a specific duty equivalent thereto; the valuation was to be based on the wholesale price of the goods at the wharf.¹⁸ Second, that no export duty was to be charged by the Ottoman Government exceeding eight per cent on goods purchased by American citizens or their agents; this duty, however, was to be reduced by one per cent every year until it would finally be reduced to one per cent. Hence at the beginning of the eighth year after the going into effect of the treaty and in the following years there was to be no export duty exceeding the one per cent.¹⁹ Third, that the duty of three per cent imposed on goods passing through the Empire to other countries was to be reduced to two per cent and at the end of eight years from the date of the exchange of ratifications of the treaty to a definite tax of one per cent, as in the case of exports of Ottoman produce to cover expenses of administration and control.²⁰ Fourth, that American citizens, vessels, commerce and navigation were to be equally granted all rights and privileges that the subjects, ships, commerce or navigation of any other foreign power enjoyed and exercised by grant made or which might be made thereafter by the Sublime Porte.²¹ Fifth, that permits to trade were not to be

¹⁸ See art. 5.

¹⁹ See art. 4.

²⁰ See art. 12.

²¹ See art. 1.

required from American nationals.²² The United States, on the other hand, was bound by the instrument to offer most-favored nation treatment to Ottoman subjects, vessels, commerce and navigation.²³

It is to be kept in mind that this treaty did not terminate the obligations under the terms of the first treaty of 1830; it confirmed the principal provisions of the previous treaty and it is important in that it went into detail as to the regulation of the values upon which the *ad valorem* duties were to be based and in that it defined the tariff rates. It was drawn up for a definite period and at the expiration of that period each of the contracting parties might give a notice for its revision or termination. Thus after having given notice to the American Government in 1884, the Turkish Government considered the treaty as abrogated since that year.

THE EXTRADITION TREATY OF 1874

This was followed by an extradition treaty concluded in 1874, consisting of eight articles. The treaty bound both parties to deliver up fugitive criminals charged with any of the crimes enumerated therein, excluding the obligation of delivering up persons charged with offences of a political nature. The treaty also dealt with the procedure by which a requisition was to be presented and with the regu-

²² See art. 2.

²³ See art. 19.

lation of the payment of the expenses involved in the arrest and transportation. It was finally stipulated that neither party was to be bound to deliver up its own citizens. The treaty was to continue in force for five years from the time of its coming into effect, and if a notice of the intention to terminate the treaty should not have been given by either party within six months before the end of the period, the treaty was to continue in force for another five years and so on.²⁴

THE PROTOCOL OF 1874

The last agreement between Turkey and the United States was the protocol of 1874 by which American rights in regard to real estate were defined. This was the same protocol to which most of the foreign powers adhered, stating the conditions under which foreigners could hold landed property in Turkey.²⁵ It provided that the preceding immunities and privileges, as specified by the capitulations, were to remain in force until the revision of the ancient treaties, which revision the Sublime Porte reserved to itself the right to bring about by reaching an understanding with the powers.

²⁴ For text, see *Malloy*, II, 1341-1344. The treaty was concluded on August 11, 1874, and ratified by the President on January 22, 1875. Ratifications were exchanged on April 22, 1875, and proclamation was made on May 26, 1875.

²⁵ Cf. *supra*, pp. 81-83.

ACTS OF CONGRESS CARRYING TREATIES INTO EFFECT

In connection with the execution of these chief documents upon which Turkish-American relations were based, several acts were passed by congress. The first act was that of August 11, 1848,²⁶ giving certain judicial powers to ministers and consuls of the United States in China and Turkey; it provided "that all such officers shall be responsible for their conduct to the United States and to the laws thereof, not only as diplomatic functionaries and commercial functionaries, but as judicial officers when they perform judicial duties, and shall be held liable for all negligences and misconduct as public officers."

This act failed, however, to confer upon the consuls of the United States in Turkey authority to exercise judicial functions in civil cases, whatever may have been the interpretation of the treaty of 1830. Thus on June 22, 1860, another act was passed²⁷ the original aim of which was to carry into effect a new treaty made with China in 1858 and other treaties made with Japan, Siam, Persia, and other countries. This act conferred upon American ministers and consuls in Turkey judicial power "for the exercise of jurisdiction in civil cases wherein the same is permitted by the laws of Turkey or its usages in its intercourse with the Franks or other foreign Christian nations." Another act was passed

²⁶ 9 *U. S. Statutes at Large*, pp. 276-280.

²⁷ 12 *U. S. Statutes at Large*, pp. 72-79.

in 1866 to carry into effect the treaty of 1862 with Turkey extending to Egypt and the consul-general there the provisions of the act of 1860.²⁸

MISSIONARY PROBLEMS

Although the earliest American relations with Turkey were intimately connected with commercial interests, nevertheless the chief diplomatic correspondence was centered on missionary problems. "Upon no other subject," wrote Hinckley, "is the printed diplomatic correspondence of the United States so voluminous as upon that of the protection of missionaries in oriental countries."²⁹ The main reasons, according to him, were: That the missionaries find their way into the interior where few or no foreigners are found; that their relations with the natives are bound to be much closer than the contacts of the mercantile classes with the inhabitants; that privileges not inserted in the treaties nor granted to foreigners in other occupations have been allowed to missionaries; that some missionaries have assumed powers which in some instances interfered with prerogatives of the local authorities. To these, we must add the lack of communications, the difficulty involved in securing uninterrupted contact with

²⁸ See *Dainese v. Hale* (91 U. S. Reports, 1875, p. 13).

Another act was passed on July 1, 1870 (16 *Stat. L.*, p. 183), providing for the question of appeal. Amendments were introduced by the acts of March 3, 1873 (Ch. 249, 17 *Stat. L.*, 582), and of June 14, 1878 (Ch. 193, 20 *Stat. L.*, 131).

²⁹ Hinckley, *op. cit.*, p. 108.

the consuls, and the ignorance of the local officials which impeded the execution of laws passed by the central authority in favor of foreign missionaries.

AMERICAN MISSIONARIES IN TURKEY AND THEIR ACTIVITIES

As early as the beginning of the nineteenth century American missionaries began to penetrate into parts of the Ottoman Empire. The oldest American organizations involved in missionary and philanthropic work in Turkey are the American Bible Society (1816) and the American Board of Commissioners for Foreign Missions (1819). The first American missionaries sent to Turkey were Pleny Fisk and Levi Parsons; they landed in Smyrna on January 5, 1820, where they established the first American missionary station. Their attempt to work among the Jewish population of Palestine proved to be unsuccessful and they soon came to the conclusion that Beirut was the most suitable center for Syria and the Holy Land where the natives—Jew, Christian, and Moslem—could be reached through one common language, the Arabic. Thereupon, a missionary station was established there three years later by William Bird, William Goodell, and their wives.

Another station was established in Constantinople in 1831 and stations were later opened at Urumia (1835), Trebizond (1835), Erzerum (1839), Aintab (1847), Tripoli (1848), Sidon (1851), Sivas (1851), Adana (1852), Marsovan (1852), Diarbekir (1853),

Cesarea (Talas) (1854), and Harpoot (1855). Other stations were later established at Van and in Syria.³⁰ Thus in the latter part of the nineteenth century Turkey was dotted with American missionary establishments engaged in educational, evangelistic, philanthropic, social, medical and cultural work.

The failure to win converts among Jews and Moslems led the missionaries to direct their attentions towards Christian churches. Most of their activities were carried out among the Armenians. Thus among the early missionary problems to be solved was that of securing protection to the Armenian converts who on account of their conversion to Protestantism were excommunicated by the Armenian Clergy.³¹ It is to be remembered that under the Turk-

³⁰ See A. H. Lybyer, "America's Missionary Record in Turkey," *Cur. Hist.*, February, 1924, XIX, 802-810.

³¹ It is to be noted that Russian attitude was against the propagation of Protestantism in Turkey. In his *History of Turkey*, Rosen records an act on the part of the head of the Gregorian sect, whose seat was in Russian territory, instructing the Armenian Patriarch of Constantinople to suppress Protestantism by all means in his power. The Russian ambassador at Constantinople is quoted to have declared (1839) that "the Tsar would never allow Protestantism to set its foot in Turkey." (See C. Hamlin, "Our Relations with Turkey," *Our Day*, May, 1889, III, 480-481.) In the words of Oscar S. Straus, former American ambassador to Turkey: "The greatest opposition that the American missionaries and educators had to encounter in Turkey did not come from the Mohammedans, who regarded their efforts, if not with opposition, at least with a certain degree of complacency, but the opposition came from the French and Russian influences. . . . From my own experience during the three different times I represented the United States in Turkey as Minister and as Ambassador, I found most of the difficulties the American missionary and educational institutions in Tur-

ish millet system³² the head of the community was the sole protector of the members of that community and the only agent through whom these members could obtain justice and status. Thus, by being excommunicated, the member was *ipso facto* left outlawed without personal rights. The question was brought before the Sublime Porte in 1847, and consequently, these converts who were then called "Evangelical Christians" were recognized as a separate community with the right to elect a head who was to reside in Constantinople representing the interests of the new Protestant millet.³³

FRICTIONS AND CAUSES

Interference with missionary privileges by the local authorities, on the one hand, and restrictive laws passed by the Porte, on the other, became later the cause of continuous diplomatic controversy between the Porte and the American Government. A

key encountered were instigated by French and Russian agents, who succeeding in imbuing the minds of the Ottoman officials in the various provinces with the thought that the American institutions had a political object and were propagating sedition." (See *American Review of Reviews*, December, 1914, L, 711.)

³² Cf. *supra*, pp. 48 ff., 89 ff.

³³ The text of the firman (November 14, 1850) giving effect to the institution of the Protestant community into an autonomous body is found in G. Noradounghian, *op. cit.*, II, 392-394. See also, "Regulations of the Turkish Government, Respecting the Conditions of Protestants in Turkey, and Respecting Chapels and Burial Grounds for, and the Exercise of Religion by Them, 1845-1854." Hertslet, *Commercial Treaties*, IX, 739-747 and XI, 549-551.

There were 54,000 Protestants registered in 1909.

special school law was passed in 1869 by the terms of which schools, other than those established by the Government, could be opened only upon the grant of a permit by the ministry of public instruction certifying government approval of the course of study, text books, and teachers.³⁴ There was much variation in the administration of the school laws, and in some cases schools were refused a permit even when they complied with the regulations.³⁵

Regulations were passed in 1863 concerning the licensing of graduates in medicine which were to apply to graduates of foreign institutions as well as to graduates of the American Medical College of Beirut. The regulations required doctors of medicine or of surgery: First, to register their diplomas

³⁴ Aristarchi Bey, *Législation Ottomane*, III, 299.

³⁵ See Hinckley, *American Consular Jurisdiction in the Orient*, p. 113.

Especially after the Armenian massacres (cf. *infra*, pp. 145 ff.) diplomatic controversy concerning school regulations became intense. Mr. Leishman, then American minister to Turkey, writing to Secretary Hay (December 31, 1903), said: "The most bitter and determined opposition has been encountered against the granting of equal privileges to American schools on the ground that they are hot-beds of sedition, and this idea has been fostered and stimulated by foreign intrigue and encouraged somewhat by the very impolitic actions of some of the missionaries. . . . No stone has been left unturned in my efforts to secure a peaceable adjustment of the schools question, but I fear that it will be next to impossible to obtain a proper settlement without resorting to more forcible measures." (A. L. P. Dennis, *Adventures in American Diplomacy*, p. 463.)

The handicap under which the early American teachers had to labor is illustrated by the story of the geography textbook from which a physical map of Turkey had to be torn off because a part of it had the same color as a map of China. (Cf. P. K. Hitti, *The Syrians in America*, N. Y., 1924, p. 29.)

at the Imperial School of Medicine; the registration was to be made only upon the presentation of a passport duly viséed by the Constantinople authorities of the countries to which they belonged. Second, to undergo a colloquium.³⁶

Other restrictions were imposed by the Turkish Government on the importation, the printing and the circulation of books in Turkey. Regulations to this effect were passed on January 21, 1858, these being later superseded by a more restrictive law decreed on January 10, 1888. The most objectionable part of the latter was that providing that a foreigner could not set up a printing office without furnishing a declaration legalized by the embassy or legation of his country to the effect of relinquishing his capitulatory rights and accepting the proceedings prescribed for Ottoman subjects. Against this, the representatives of the foreign powers together with the American minister³⁷ in Constantinople protested to

³⁶ *For. Rel.*, 1898, pp. 1102-1103.

³⁷ It was not until 1906 that the American legation at Constantinople was raised to the rank of an embassy. Much earlier, however, the attempt was made by the American Government to raise the legation to an embassy in order to give the American representative personal access to the Sultan who was then the real director of public policy and in whose hands power was concentrated. In 1904, the Turkish Government maintained that the financial conditions could not permit the raising of the Ottoman legation at Washington to the rank of an embassy, but it added that it would take up the question as soon as the fiscal situation would permit. Two years later, the question was brought up again, and after reaching an agreement, John G. A. Leishman of Pennsylvania, who was then minister of the United States at Constantinople, was commissioned ambassador extraordinary and plenipotentiary, June 18, 1906. (See

the Imperial Government. The American Government held "that it was not competent for a citizen to divest himself of any part of his inherent right to protection, though he might conclude his rights in that regard by ceasing to be a citizen."³⁸

In addition to these restrictions, capitulatory rights were infringed upon on several occasions. In 1895, armed men entered the premises of an American missionary at Tarsus and attacked the servants in charge. Due to the neglect of the local authorities to prosecute the offenders, a naval vessel was sent to Mersine, and finally the Turkish Government ordered the arrest of the accused, eight of whom were convicted.³⁹ In the same year, police officials, in violation of the domiciliary rights granted in the protocol of 1874,⁴⁰ entered the residence of an American missionary at Marsh without notifying the consul.⁴¹

Dennis, A. L. P., *Adventures in American Diplomacy*, p. 464; Foster, J. W., *The Practice of Diplomacy*, N. Y., 1906, pp. 28-31; *North American Review*, 1906, CLXXXII, 689-691; Van Dyne, F., *Our Foreign Service*, Rochester, N. Y., 1909, pp. 53-54.)

While the elevation of the American legation to the grade of an embassy was scarcely noticed in the United States, it seems to have provoked, especially in a certain section of the continental press, unfriendly comment. It was somewhat interpreted as a step marking the entrance of the United States into the Near Eastern Question as a claimant in the then anticipated division of the spoils. (See *American Foreign Policy*, By a Diplomatist, Boston and N. Y., 1909, p. 139.)

³⁸ Hinckley, op. cit., p. 114; see also, "Troubles of Americans in Turkey," *The Nation*, N. Y., June 16, 1892, LIV, 443-444.

³⁹ *For. Rel.*, 1895, part 2, p. 1258.

⁴⁰ See supra, pp. 81-83, 137.

⁴¹ *For. Rel.*, 1895, part 2, p. 1252; *ibid.*, 1892, p. 601.

The question of the use of missionary dwelling houses as churches and schools was another source of diplomatic entanglement. In many instances Turkish authorities refused to issue a building permit for the erection of a dwelling house on the ground that the missionary would not bind himself not to use the house for school purposes.⁴²

ARMENIAN DISTURBANCES AND AMERICAN MISSIONARIES

The missionary problems continued to be a source of controversy until the climax was reached in the latter part of the nineteenth century when the Armenian disturbances broke out. Missionary buildings were burned and American property was destroyed.⁴³ To protect the American missionaries, three naval vessels were ordered to Turkish waters and their officers were placed in direct communication with the localities where trouble had occurred. "At no time," says Hinckley, "during the seventy years and more that American missionaries had been residing in Turkey had they been in greater danger, and never was the purely charitable nature of their work, nor their rectitude and prudence, more clearly shown."⁴⁴

The Turks contended that the American missionaries had a hand in the Armenian plot—a contention refutable in the light of facts. That American edu-

⁴² See *ibid.*, 1891, p. 755; *ibid.*, 1892, p. 527; *ibid.*, 1893, p. 625; *ibid.*, 1894, p. 693.

⁴³ *For. Rel.*, 1896, p. 895; 1895, part 2, pp. 1369, 1416.

⁴⁴ F. E. Hinckley, *op. cit.*, p. 117.

cation had a great influence in awakening the mind of the subjugated Armenian and that American public opinion sympathized with the persecuted Armenian can hardly be denied; but can this humanitarian spirit be a good ground for the attitude of the Ottoman Government? The most biased mind would certainly answer in the negative. The Turks opposed educational movements not only among the Armenians, but also among their other subjects such as the Arabs, the Kurds, etc. They realized that the success of their reign over their non-Turkish subjects was partly, if not largely, dependent on the ignorance of those subjects. Generally speaking, the American missionaries have always opposed bloody revolutions. Unlike most of the European powers, the United States did not have any political interests in the Near East;⁴⁵ the American Government avoided political entanglement of every sort in Turkey. Some of the European powers, for instance, claimed the protection of certain churches in Turkey with which political interests were associated.⁴⁶ The American Government, on the other hand, could by no means advocate any principle but that of religious freedom; it is bound by the spirit of its institutions to make no distinction on account of creed or class.

⁴⁵ The United States was, however, interested in the question of the Straits, if this is to be considered a political question. Her aim was to secure equal opportunities to all vessels without distinction of nationality.

⁴⁶ See *supra*, p. 96.

AMERICAN CLAIMS

As a result of the Armenian disturbances there was a heavy loss of American property and many teachers lost their lives, despite the earnest attempt of the Turkish authorities to protect American lives and property. A bill for damages was presented by the American consulate to the Turkish Government, but the latter refused to compensate. In September, 1896, Joseph Chamberlain asked Secretary Olney whether the United States would consent to join Great Britain in any action against Turkey, and the answer was that the United States would positively insist on the claim for damages and it would support the demand by using all the physical force available. Lord Salisbury, however, refused the plan.⁴⁷ Satisfactory arrangements were finally made concerning the payment of the bill for damages, but this was effected only through the pressure exerted by the friendly visit of an American war vessel headed by Admiral Chester.

DISCRIMINATION AGAINST AMERICAN MISSIONARIES

In connection with the Armenian trouble several new questions arose. The Turkish Government forbade admission to Turkey of Armenians who had been away from Turkey for the preceding twenty years. This obviously affected Armenians naturalized in the United States who contemplated a tem-

⁴⁷ Dennis, *Adventures in American Diplomacy*, p. 450.

porary visit to Turkey, and the fact that the American Government could not legally refuse to issue passports to such persons gave rise to a serious question.⁴⁸

In violation of treaty rights, Turkey also impeded the free passage of Americans into the interior of Asia Minor, although the right to refuse the granting of permits was not claimed.⁴⁹

And finally, controversies arose over the problem of erecting new school buildings, missions and orphanages which were needed most at the end of the disturbances. Disorders in Turkey made the situation worse, and on several occasions American cruisers were called to visit Turkish ports without taking action.⁵⁰ Early in the twentieth century, however, Turkey finally agreed not to discriminate against American institutions but to treat them as the institutions of European powers were treated. Dr. Barton stated,

After seven years of negotiations, in 1907 the Sultan finally conceded in a formal manner the same rights and privileges to American institutions in his dominion which had already been granted to similar institutions of France, Russia, Germany and other countries; but as yet in most cases this concession exists largely in form, while the actual enjoyment of the privileges is withheld.⁵¹

⁴⁸ See *supra*, pp. 105-108.

⁴⁹ *For. Rel.*, 1898, p. 1095.

⁵⁰ See Americus, "Some Phases of the Issues between the United States and Turkey," *North American Review*, May, 1906, CLXXXII, 689-700.

⁵¹ J. L. Barton, *Daybreak in Turkey*, Boston, 1908, p. 246.

AMERICAN SENTIMENTAL INTEREST IN TURKEY

That the interests of the United States in Turkey have been largely humanitarian can hardly be questioned. The United States had a deep sentimental interest in Turkey, and it is safer to say *had* because that interest was mostly connected with the Armenians of Turkey who are no more in the New Turkish Republic. In his message to Congress (May 24, 1920),⁵² concerning the mandate for Armenia,⁵³ President Wilson said:

The sympathy for Armenia among our people has sprung from unstained consciences, pure Christian faith and an earnest desire to see Christian people everywhere succored in their time of suffering and lifted from their abject subjection and distress and enabled to stand upon their feet and take their place among the free nations of the world. . . . At their hearts, this great and generous people have made the cause of Armenia their own.

In the report of the American military mission sent to investigate and report on the conditions of Armenia, known as the Harbord report,⁵⁴ we find a

⁵² See *Congressional Record*, May 24, 1920; also, *International Conciliation*, Pamphlet No. 151 (June, 1920), pp. 13-16.

⁵³ The treaty of Sèvres (see *infra*, p. 207), the peace treaty of 1920 with Turkey which has never been signed by the Nationalist Government of Turkey, provided for an independent Armenia referring the question of the boundary to the arbitration of the President of the United States. The conference of statesmen sitting at San Remo to work out the details of this peace treaty addressed a definite appeal to the American Government to accept a mandate for Armenia. In the address of May 24, 1920, President Wilson brought the appeal before Congress; but the latter declined to accept the mandate (June 1, 1920) by a vote of 52 to 23.

⁵⁴ 66th Cong., 2d sess., Sen. Doc. XV, Nos. 266, 281. See *infra*, p. 208, n. 7.

tabulation in parallel columns of "Reasons for" and "Reasons against" the acceptance of a mandate for Armenia, with fourteen in the former and thirteen in the latter. The eleventh "Reason for" reads: "America has strong sentimental interests in the region—our missions and colleges."

This is substantiated in the light of the statistical record of the financial support invested by the American people in humanitarian and philanthropic enterprises in Turkey: In one of its financial reports, the American Board of Commissioners for Foreign Missions stated that since 1819, over sixteen and one-half million dollars had been expended in the Near East, the majority of which was spent in Turkey proper. According to an official of the Near East colleges, an amount of ten million dollars had been invested in the educational work of the three institutions in Turkey within the last sixty years; namely, Constantinople Woman's College (1908), Robert College (1863), and the International College of Smyrna (1903). Before it withdrew from Asia Minor in 1923, the Near East Relief had spent forty million dollars in Turkey. It is roughly estimated that the total American investment in missionary and philanthropic work in Turkey was 123 million dollars, this including sums spent on work outside the present confines of Turkey.⁵⁵

⁵⁵ See *Foreign Policy Association, Information Service*, January 5, 1927, No. 22, II, 255.

A contrast with the American investments in missionary enterprises in China shows that American humanitarian interest was

That the United States had no political or economic interest in the Ottoman Empire is well illustrated in the incident of 1907 when the tariff rates on imports into Turkey were raised from eight per cent to eleven per cent *ad valorem*. In return for their consent, the European powers demanded certain economic privileges with which Turkey had to comply before the agreement concerning the customs duties could go into effect.⁵⁶ What did the American Government demand in return for her assent to the increase of the duties? Ambassador Leishman was authorized by the Department of State to demand non-discriminatory treatment for American missionaries, institutions, and nationals, as stipulated in the treaties, as prerequisites for the American consent to the increase of the tariff rates.⁵⁷

much more significant in the Near East than it was in the Far East. Of \$150,000,000, the total American investments in China, \$80,000,000 were invested in missionary work. (Hornbeck, "China to-day: Political," *World Peace Foundation Pamphlets*, 1927, No. 5, X, 482.) Not only was the investment in missionary enterprises larger in the Near East, but also the economic investment in Turkey was much less as compared with the \$70,000,000 invested in China.

In 1913, exclusive of Syria, there were in Turkey nine colleges with about 2400 students, about 50 boarding and high schools with 4500 students, and 400 common schools with 20,000 students. In 1914, there were ten American missionary hospitals in Turkey with two or three others under American managements. (See: *Cur. Hist.*, XIX, 807; *ibid.*, January, 1923, XVII, 596-600; Matteosian, "Official List of American Religious, Educational, and Charitable Institutions in the Ottoman Empire" [1907].)

⁵⁶ See *supra*, p. 74, n. 16.

⁵⁷ Cf. *For. Rel.*, 1906, part 2, p. 1413; *ibid.*, 1907, part 2, p. 1051.

CHAPTER VIII

THE HISTORICAL EVOLUTION OF THE INTERNATIONAL RECOGNITION OF THE CAPITULATIONS

INTRODUCTORY

Historically speaking, the capitulations may be roughly regarded as having undergone a change—if not in content or in principle, at least in their international recognition—passing through three distinct periods in the process of evolution. In discussing these three periods, it seems that we should make a distinction between the terms “binding” and “reciprocal.” In speaking of agreements we can hardly substitute the one for the other; for, under certain circumstances, a reciprocal grant or agreement may not necessarily be strictly binding, whereas under other conditions a binding agreement may involve a unilateral grant of privileges such as the capitulations in Turkey in the later period. Let us therefore keep this distinction in mind while surveying the three periods through which the capitulations had evolved.

FIRST PERIOD—EARLY EXTERRITORIAL SYSTEM

Although not strictly binding in character, the earliest grant of independent national jurisdiction within foreign territory was more or less voluntary and reciprocal, conceded in accordance with common usage and mutual convenience. It was the prin-

ciple of the Roman law that the Roman carried his law wherever he went, and Italian cities as well as other cities preserved and maintained the fundamental principles of the Roman law. These reciprocal arrangements were, therefore, based on this accepted principle and were the growth of a normal procedure.

There was nothing written concerning extraterritoriality in the earliest period of the development of the system. Custom and usage were the binding elements and the extraterritorial arrangements were faithfully executed by the parties concerned as long as no exceptional events occurred to break the even tenor of the times. When members of a community moved to establish themselves on foreign territory, it was understood, without becoming a ground for negotiations, that they were to be governed according to their own laws in that territory. "When the Greek Emperors, or the Saracens granted permission to reside in their territory, it was on the well-understood condition that the foreigners on whom the privilege was bestowed should remain subject to the sovereign to whom they had owed allegiance before coming. They were to remain under his jurisdiction while residing on foreign territory, and he was to support the burden of governing them."¹ Thus it seems doubtful whether these early arrangements can be referred to as privileges.²

¹ E. Pears, *Turkey and its People*, p. 337.

² "What is now regarded as at least an equally valuable concession," says Sir Edwin Pears, "namely that foreigners should be

In explanation of the situation it may be said that there had been no perfect notion of sovereignty in earlier days; neither was the idea of public right developed to its present stage of recognition. The conception of public right grows much slower than the claim of private rights. It is believed, even up to this day, that the notion of public right is still far behind private interests in growth. Thus, before becoming territorial, the concept of sovereignty was purely personal. In the early period of the growth of the concept of sovereignty there was no fixed home life nor permanency of habitation. Groups settling themselves one day here, the next day there, had placed themselves under the command of a chief in whose person sovereignty was expressed. It is, therefore, obvious that under these circumstances the notion of territorial sovereignty could not have been entertained by such a social organization. It was only when people began to become sedentary that the juridical relation between the territory and the occupants became noticeable. This relation, however, was largely confined in its inception to private rights, collective or individual, with little regard to territorial sovereignty. Thus, when as a result of wars and invasions, groups of various races with

governed by their own magistrates, who should administer their own laws, was not considered by the emperors or sultans as a privilege. It was an obligation imposed on them as a condition upon which they enjoyed the privilege of residing in the foreign country." (See *ibid.*, p. 336; also, Pears, *The Fall of Constantinople*, p. 149, n. 1.)

different social and legal concepts were forced to live together on the same soil and under the same authority, the notion that sovereignty remains purely personal kept each race under its own laws and governed by its own magistrates in so far as the recognized political sovereignty was not interfered with. This state of things, therefore, could not disappear without the process of a perfect assimilation of the various elements and without the formation of a homogeneous society flourishing within a defined territory as a social entity under the same authority and the same jurisdiction.

Roughly speaking, the fifteenth century may be taken as marking the beginning of friction between the established principles of the first period of the extritorial system and the new concepts introducing the new social and political atmosphere of the second period. In conclusion, we may summarily characterize the extritorial system of the first period as having been more or less reciprocal or mutual in character, as having depended for its execution on custom and usage, and as having owed its existence to the early political concepts and structure of society.³

³ That the early practice of extritoriality was mutual and reciprocal is substantiated by historical facts: The Mohammedans who had been residing in Sicily, for instance, had enjoyed there the privileges of the extritorial system just as foreigners had enjoyed their extritorial immunities in Mohammedan countries. (See *supra*, p. 46.) Similarly, the Venetians recognized the extritorial system in their relationship with the Turks. A Turkish community stationed at Salonica was given therein the right of extritorial

SECOND PERIOD—EARLIEST CAPITULATIONS CONCEDED
BY THE TURKISH SULTANS

The above comment makes it clear that the growth of the idea of territorial sovereignty became largely dependent on the degree with which society had been subjected to the evolutionary process in political, social, and economic matters. Thus it is not hard to

jurisdiction in civil cases arising among the members of that community. (See A. Aliotti, *Les Français en Turquie*, p. 24, also, Desjardins, *Séances et travaux de l'académie des Sciences morales et politiques*, 1891, I, 50.) There is also a record of a situation whereby a Moslem community, settled in Constantinople before the fall of that city into the hands of the Turks, was allowed by the Christian emperors to be governed by a *cadi* who rendered justice in that community according to Mohammedan law. (See: Brown, *For-eigners in Turkey*, p. 16; Twiss, *The Law of Nations*, I, 449-450; Ancien Diplomate, *Le régime des capitulations*, p. 47; Turkey No. 1, 1923, *Cmd.* 1814, p. 471.) "Before the close of the fourteenth century," says E. A. Grosvenor, "several Ottomans had become domiciled in Constantinople for the purpose of trade. Sultan Bayezid I requested the Emperor Manuel Palaiologos that they should be allowed to build a mosque, and to be judged, not by Byzantine magistrates, but by their own *kadi*. There was nothing insolent or unusual in this request. . . . Sultan Bayezid simply made the demand that no distinction should be made against his subjects, but that they should be upon the same footing as the subjects of other foreign states. There was no reason why Manuel should say nay." (*Constantinople*, Boston, 1900, II, 699-700.)

This grant of privileges in the early period of the extraterritorial system was, as it has been indicated in Chap. I, reciprocal, not only between Christians and Mohammedans, but also between non-Moslems of various countries. When the merchants of Wisby, for instance, were allowed to establish a factory at Nowogorod in Russia and to live there under their own laws, it was stipulated in the agreement signed by the Duke of Nowogorod (13th cent.) that the nationals of Nowogorod should enjoy the same privileges in Gothland. (Cf. Twiss, T., *The Law of Nations*, I, 449.)

see how the western countries gradually developed the new concept of sovereignty as being attached to territory, whereas the Orient was still cherishing the theory of legal personality.⁴ While European countries, influenced by the change of their form of society, developed the concepts of public right and territorial sovereignty giving effect to the unification of legislation and jurisdiction, oriental countries were still tolerating the old practice. The Turks voluntarily continued to grant extraterritorial privileges, whereas western nations began to feel jealous of their territorial integrity and sovereign attributes, gradually eliminating the operation of the extraterritorial system within their territory.

At a time when Christians were persecuting the Jews and at a time when Christians persecuted Christians, Moslem Turkey was a safe refuge for some 200,000 Jews and the home of religious toleration. All non-Moslem communities enjoyed freedom

⁴ The idea of territoriality of law, in challenge of the system of personality of laws, developed in Europe in the later middle ages as a result of cardinal changes in the social and economic life of the peoples of the region. The major factors involved in the process of this evolution were chiefly: First, the development of agriculture among the Germanic nations as a result of which permanency of habitation became common. Second, the attachment to a city or a community and the intermarriage between members of the different Germanic nations which made the application of personal laws difficult after a generation or two. Third, the influence of the church in family relations, establishing a more or less uniform system of regulations. And finally, feudalism which was a vital factor in developing a new form of society based on fixed home life and land ownership.

of worship and autonomous jurisdiction in accordance with their respective laws within the Empire. Never was assimilation contemplated, and both Moslem and non-Moslem seem to have been satisfied with the situation. This obviously widened the gap separating the Moslem from his non-Moslem neighbor, and the attempt made later to apply the system of territoriality of laws became difficult, if not impossible.

This explains how the personal jurisdiction, formerly tolerantly and mutually granted, began in this second period to acquire its *unilateral* character in Moslem territory. There were two major historical events which largely accounted for the development of this evolution and the clothing of the Turkish capitulatory system with the one-sided character. Firstly, the Turkish conquests increased the foreign element in the Ottoman Empire, and it is to be noted that while the number of foreigners therein increased steadily, the Turks were rarely found outside their dominions.⁵ Thus, while foreigners in the Ottoman Empire demanded and obtained the privileges formerly granted in their favor by the Byzantine emperors, the Turks had nothing to demand for their nationals abroad since they had very few Turkish traders outside the confines of their empire. Secondly, we note that, with the extension of trade, there came to be added to the personal legal rights several

⁵ This may be attributed to the lack of interest in trade on the part of the Turks.

commercial exemptions and privileges, thus giving to the old system a character of material interest and economic advantages.

It is unanimously agreed that the early capitulations granted by the Sultans were unilateral in character. They were given at a time when the Sultans were at the zenith of their power inspiring the European nations with terror. There was no power to enforce them but the free will of the grantor.⁶ The early Turkish capitulations, remarks Pradier-Fodéré, were Imperial patents granted by the Sultans, comprising a promise and involving several other interests such as the admission of ambassadors and consuls, protection of monks, and commercial matters. "These capitulations," he continues, "were then, in principle, *concessions gracieuses* granted by the Sultans without previous discussions, conferring voluntarily certain rights or privileges upon the subjects of the foreign nations with whom Turkey kept relations of trade and friendship."⁷

⁶ "The capitulations," says Sir Travers Twiss, "were rather favours or concessions on their part (the Turks) to the nations of the West." (See Twiss, "Consular Jurisdiction in the Levant, etc.," p. 4.)

"Primitivement, les capitulations furent des concessions gracieuses de privilèges et de prérogatives particulières, conférés aux membres de certaines nations étrangères." (H. Bonfils, *Manuel de droit international public*, Paris, 1914, 7th ed., p. 601.)

⁷ Pradier-Fodéré, *Traité de droit international public*, Paris, 1885, II, 690.

"It is worthy of notice," says Edward Dicey, "that the capitulations granted previously to the repulse of the Turkish invasion before Vienna were granted as favours bestowed by a superior upon

In the process of time these early capitulations or "charters of privileges"⁸ became a part of Turco-European treaties. The first capitulation in the form of a treaty was that of 1535⁹ granted to the French by Sultan Suleiman I;¹⁰ but this, in so far as the capitulations are concerned, did not change the one-sided character of the grant. Van Dyck, however, seems to assert that the treaty "contained reciprocal engagements and had the full value of a bilateral treaty,"¹¹ but this remark can hardly be accepted

an inferior. Thus, in the decree of 1468 according the capitulations to the Republic of Florence, it is stated that 'the envoy of Florentine Republic had presented himself at the court of the Sultan in 1468 and had requested of his Beneficence the renewal and confirmation of the said capitulations.' Even in the glorious days of good Queen Bess, her majesty had to ask permission from Mahmud the third 'for her subjects to trade freely in the Ottoman Empire like the Venetians, the French, the Poles, and the subjects of the Emperor of Germany'" (*Nineteenth Century and After*, July, 1906, LX, 19.)

⁸ These early capitulations differed from other treaties of peace and commerce in that they were not the result of conferences; they were voluntary acts essentially revocable at the will of the grantor; they were granted in conformity with usage and to a certain extent by necessity. In the words of Pradier-Fodéré, "Differant des traités de paix et de commerce, qui sont le résultat de conférences et de discussions, constatent des arrangements pris après débats contradictoires, lient au même degré les parties contractantes et sont réciproquement obligatoires pour toute leur durée, les capitulations n'étaient donc dans l'origine que des actes émanant d'une volonté unique, et essentiellement révocables au gré du gouvernement qui les avaient octroyés." (*Traité de droit international public*, Paris, 1885, II, 690.)

⁹ See *supra*, pp. 54, 69.

¹⁰ It is to be noted that while the capitulations were granted in treaty form to France in 1535, they remained in the form of a charter of privileges to the English.

¹¹ Van Dyck, "Report on the Capitulations," p. 124.

without reservation; for in the first place, the capitulations remained unaltered. Additional privileges were granted, but this did not change the principle upon which they were based; they were still unilaterally and voluntarily granted by the Sultan. "Willing to prove his affection for Francis," says Pradier-Fodéré, "Suleiman I gave the king of France, without being solicited, new capitulations more extensive than the preceding capitulations."¹² In the second place, the grant of the capitulatory privileges was in most cases limited in this early period to the life of the Sultan;¹³ had the Sultan found it necessary to deny the privileges granted by him or by his predecessors, there was nothing to compel him to abide by his grant or accept the arrangements of his predecessor. Furthermore, Turkey was then excluded from the Christian family of nations; it had no recognized international status.¹⁴ It was even

¹² See *R. D. I. L. C.*, 1869, I, 121; also, *supra*, p. 55, n. 40.

¹³ See *infra*, p. 279, n. 3.

¹⁴ In the case of the *Madonna del Burso*, (1802, 4 C. Rob., p. 169), Lord Stowell said: "The inhabitants of the Ottoman Empire are not professors of exactly the same law of nations with ourselves. In consideration of the peculiarities of their situation and character, the Court has repeatedly expressed its disposition not to hold them bound to the utmost rigour of that system of public law, on which European states have so long acted in their intercourse with one another."

With respect to the relation of Mohammedan countries to international law, the same view was expressed by Scott, in the *Hurtige Hane* (1801, 3 C. Rob., p. 324) as follows: "On many accounts undoubtedly (persons residing in the kingdom of Morocco) are not to be strictly considered on the same footing as European merchants; they may on some points of the law of nations, be entitled to a

interpreted at that time that the conclusion of an alliance with Turkey by a Christian Power would be construed as a treason to the Christian nations.¹⁵ It seems obvious, therefore, that the one-sided character in the grant of the capitulations did not terminate.¹⁶ One thing, however, makes this first

very relaxed application of the principles, established by long usage between the states of Europe, holding an intimate and constant intercourse with each other. It is a law made up of a good deal of complex reasoning, though derived from very simple rules, and altogether composing a pretty artificial system, which is not familiar either to their knowledge or their observance. Upon such considerations, the Court has, on some occasions, laid it down that the European law of nations is not to be applied in its full rigour to the transactions of persons . . . residing in that part of the world." (See also: *The Kinders Kinder*, 1799, 2 C. Rob., p. 96; *The Helena*, 1801, 4 C. Rob., p. 3; E. Dickinson, *Equality of States in International Law*, London, 1920, pp. 163, 223.)

It is also to be noted that even as late as the early part of the nineteenth century, Turkey was not allowed an international status. Turkey was not represented at the Congress of Vienna of 1815, nor was it included in the provisions of positive public law contained in the treaty which was the achievement of the Congress. (Cf. R. Phillimore, *Commentaries upon International Law*, 2d ed., London, 1871, I, 87.)

¹⁵ It was the fear of the possible effect of his negotiations with the Porte upon his relations with the Christian powers that led Francis I to choose a Hungarian instead of a Frenchman to head his secret mission to the Turkish sovereign, hoping thereby that he could disown his unofficial envoy in case of failure. (See *supra*, p. 55, n. 40.)

¹⁶ It is also to be noted that the lack of reciprocity is apparent in the situation whereby the Ottoman consuls accredited to Christian countries were not given the right to assume jurisdiction over their own nationals. Most writers seem to agree that the capitulatory treaties were unilateral in character. Famin goes even so far as to say that the French treaty of 1740 (see *supra*, pp. 58-59) is improperly designated under the name of treaty. (See C. Famin,

treaty significant and that is the insertion of the capitulatory privileges for the first time in a definite treaty, thus giving a political character to the capitulatory system. But the mere assumption that treaties can be nothing but bilateral and binding on the signatory parties does not furnish any proof of alteration in the character of the capitulations.

THIRD PERIOD—LATEST CAPITULATIONS IN TURKEY

The third period which may be roughly said to begin in the eighteenth century is essentially significant in that it grafted a binding character upon the capitulatory system. *Privileges* granted in the early

Histoire de la rivalité et du protectorat des églises Chrétiennes en orient, pp. 23-25, 33.) Confirming the same view, Vandal asserts that "never did the King (of France) and the *Grand Seigneur* sign a treaty binding the one to the other or imposing reciprocal engagements." (Cf. A. Vandal, *Une ambassade Française en Orient sous Louis XV*, Paris, 1887, p. 4.) Again, speaking of the French treaty of 1740, De Flassan states that "De Villeneuve used the credit acquired by the success of his mediation to renew the capitulations which are nothing but patents containing privileges granted by the *Grand Seigneur*; for these are not treaties in the strict sense." (See De Flassan, *Histoire générale et raisonnée de la diplomatie Française*, Paris, 1809, V, 64-65. Also, A. Rivier, *Principes du droit des gens*, Paris, 1896, I, 544 and F. Despagnet, *Cours de droit international public*, 4ème édition, 1910, p. 490.)

Fauchille, however, contends that these opinions cannot be accepted due to the reason that most of the capitulations bore a reciprocal character. Mentioning the treaty of April 15, 1454, between Venice and Mohammed II (see *supra*, p. 52) and the French treaties of 1535, 1569 and 1740, (cf. *supra*, pp. 54, 55, 58-59, 69), he maintains that these imposed reciprocal obligations and were the results of conferences and discussions. (See P. Fauchille, *Traité de droit international public*, 3ème partie, I, 448.) Arminjon upholds the same view. (See *Chunet*, 1905, XXXII, 133, 558.)

period of Turkish reign became *rights* in this new period. While they remained unilateral and one-sided,¹⁷ the capitulations gradually became international treaties and of such a binding character that some writers went far enough to maintain that they were to operate even in time of war in the country granting them.¹⁸

The insertion of the capitulatory clauses in a political or commercial treaty was of no importance in the early period of the Ottoman reign, for Turkey was then at the height of her power and she was furthermore excluded from the family of nations. Two factors made this of great significance later, namely: (a) The beginning of the decay of the Ottoman Empire; (b) the admission of Turkey into the family of nations.

It was in the sixteenth century that the idea of territorial sovereignty began to influence political thought in most European countries. The degree to which it was entertained by these countries and the extent to which it was developed in the various

¹⁷ Contrasting the capitulatory system of the first period with that of the third period, Professor Brown affirms: "We thus have five hundred years before the capture of Constantinople by the Turks treaty agreements granting to foreigners very similar extraterritorial privileges to those granted in turn by the Sultans of Turkey, with this important difference, however, that while the earlier privileges were reciprocal in character, the immunities of jurisdiction which still exist in the Ottoman Empire are entirely one-sided concessions on the part of the Turks." (P. M. Brown, *Foreigners in Turkey*, p. 12.)

¹⁸ See *infra*, pp. 285-286.

states depended largely, as it has been explained above, on the degree and the extent to which each society was influenced by evolutionary processes. Turkey was one of the slowest to adopt the new doctrine. When western nations began in the sixteenth and the seventeenth centuries to restrict the operation of foreign jurisdiction within their territory, the grant of extraterritorial privileges in the Ottoman Empire became commoner than it had ever been before. It was in the latter part of the eighteenth century when Turkey began to grasp slowly the significance of the new doctrine of territorial sovereignty that the question arose as to whether Turkey, a non-Christian nation, should be given the right to enjoy the principles of the doctrine. It is to be remembered that Turkey was growing weaker and weaker, corruption and maladministration becoming the chief phenomenon in the Empire. In the meantime the birth of the Near Eastern Question together with the doctrine of the Balance of Power gave rise to several abuses of the capitulations. Political clauses began to form a part of the capitulations. Under these circumstances the Powers decided to insist on the continuation of the capitulatory system in Turkey, notwithstanding the many protests made by the latter. They maintained that the capitulations formed a part of international treaties and could not be abolished without mutual consent and without the introduction of reforms in the judicial system of Turkey. It is, however, to be noted

that the doctrine "might is right" played a cardinal rôle in the settlement of the question.

By the treaty of Paris of March 30, 1856,¹⁹ Turkey was "admitted to participate in the advantages of the public law and system of Europe," and the independence and integrity of the Ottoman Empire was guaranteed by the Powers.²⁰ This admission would seem to have made the revision of the system of the capitulations indispensable, for the logical implications would give the Ottoman Government the privilege of participating in all rights enjoyed by the Christian nations, including the exclusive right of territorial sovereignty.²¹ What happened, however,

¹⁹ For the text of the treaty, see: Martens, *Nouveau recueil général de traités*, XV, 770; Holland, T. E., *The European Concert in the Eastern Question*, pp. 241-260; C. Phillipson, *Termination of War and Treaties of Peace*, pp. 350-357. The protocols of the congress of Paris with the text of the treaty are found in Noradounghian, *op. cit.*, III, 1-83.

²⁰ See art. 8 of the treaty; also *supra*, p. 93, n. 10, and *infra*, p. 178.

The guarantee of the integrity of the Ottoman Empire was also pledged by the powers in a separate tripartite treaty signed by Great Britain, Austria, and France on April 15, 1856. (For text, see Martens, *op. cit.*, XV, 790-791.)

²¹ "On general principles," remarks W. E. Hall, "the capitulations should have been abrogated. In Protocol XIV of March 25, 1856 (cf. *infra*, p. 178), 'M. le Baron de Bourquency and the other plenipotentiaries admitted that the treaty of peace tends necessarily to bring about a situation in which the capitulations come to an end.'" (*A Treatise on International Law*, Oxford, 1924, p. 60, note. Cf. statement made by the Turkish delegate at the Lausanne Conference, Appendix V, pp. 334-335.

A. D. F. Hamlin seems to assert that the admission of Turkey into the Concert of Europe was in the nature of a favor extended by the European Powers and that the favor was given on condition that the capitulations were to continue to operate. "... this ad-

was just the contrary. Article XXXII of the treaty provided that the treaties or conventions which had existed before the war were to continue to operate until they would be either renewed or replaced by new acts. In other words, no change was to be effected in any of the capitulatory privileges without the consent of the Powers concerned. One-sided as they were, the capitulations thus acquired an international status and the binding character of an international treaty. So the system which constituted a paramount restriction upon the sovereign rights of Turkey did not disappear with the formal admission of Turkey into the family of nations.²² On the contrary, we find in most of the treaties con-

mission to a *quasi*-equality with the nations about her," says he, "has been accorded to Turkey, not as a matter of right, but of favor. . . . When in 1856, by the Treaty of Paris, the Ottoman Empire was admitted to a qualified membership in the political family of European nations, the maintenance of the Capitulations was a part of the price of the favor." (The Forum, July, 1897, XXIII, 523, 530.) This remark seems to suggest a peculiar inconsistency of thought on the part of Mr. Hamlin; for how could the Powers demand that the continuation of the system of the capitulations should be the price of the admission of Turkey to the advantages of public law when the Powers themselves recognized the fact that the system was incompatible with the principles of international law?

²² "To admit a country in the international concert," says Abi-Chahla, "recognizing that it is in a position to exercise the absolute rights of the sovereign states and at the same time seek to impede this exercise by meddling in the internal affairs of that country is an apparent contradiction. 'Donner et retenir ne vaut.'" (*L'Extinction des Capitulations en Turquie et dans les régions arabes*, p. 115.) Such an argument, however, received scant attention from the powers.

cluded with the Porte thereafter a formal declaration in their first articles providing that "all rights, privileges, and immunities, which have been conferred . . . are confirmed, now and forever."²³

In the Protocol of January 17, 1871, signed by Great Britain, Austria-Hungary, France, Italy, Germany, and Turkey, the principle of "non-alterations of treaties without consent of contracting parties" was recognized.²⁴ Turkey, a signatory to this protocol, was thus bound to observe the principle therein, and the capitulations could not, therefore, be abrogated without the consent of the Powers concerned since they were granted under treaties.²⁵

²³ Cf. art. 1 of the Turkish-American Treaty of 1862. (*Malloy*, II, 1321.) The same provision is found in the treaties of the other powers concluded with Turkey in 1861 and thereafter.

²⁴ The Powers declared "that it is an essential principle of the law of nations that no power can liberate itself from the engagements of a treaty, nor modify the stipulations thereof, unless with the consent of the Contracting Powers by means of an amicable arrangement." (Hertslet, *The Map of Europe by Treaties*, London, 1875, p. 1904.)

This protocol was signed in the conference called to meet in London as a result of Russia's declaration that she would no more be bound by the clause of the treaty of Paris of 1856 relative to the naval warfare in the Black Sea. Russia's declaration was largely based on the grounds of alteration of essential conditions. (See *infra*, pp. 300-301.)

²⁵ It is argued by some authors that this protocol did not apply to the capitulations. According to Professor Paternostro, the declaration of 1871 did not bind the Ottoman Government with regard to the capitulations; it applied to a general treaty elaborated by a general congress destined to regulate the political and the territorial equilibrium of Europe. (Cf. H. Abi-Chahla, *L'Extinction des Capitulations en Turquie*, etc., p. 120.)

Similarly, in the treaty of Berlin of 1878,²⁶ article VIII referring particularly to Bulgaria, stipulated that "the immunities and privileges of foreigners, as well as the right of consular jurisdiction and protection as established by the capitulations and usages, shall remain in full force so long as they shall not have been modified with the consent of the parties concerned."²⁷ "The foreign powers," concludes Pradier-Fodéré, "thus transformed into contracts the concessions that Turkey had temporarily granted. The substitution of a treaty for the voluntary concession deprived the latter of its revocable character."²⁸ And, finally, it is safe to say that the capitulations acquired in the last period of their history the validity of treaties despite their anomalous character in international law and the unilateral feature in the grant of privileges.

THE CAPITULATIONS AND INTERNATIONAL LAW

That the capitulatory institution is anomalous and incompatible with modern political concepts has been

²⁶ This treaty revised the treaty of San Stefano of March 3, 1878, concluded after the defeat of Turkey in the Russo-Turkish war (1877-1878). The San Stefano peace agreement was revised in the interests of Austria-Hungary and Great Britain. (An account of the Congress of Berlin is given in *Great Britain Foreign Office Historical Section*, XXIV, *Peace Handbook* No. 154; also, Noradounghian, *op. cit.*, IV, 1-175. For the text of the treaty of Berlin of July 13, 1878, see: *St. P.*, LXIX, 749-768; Holland, *op. cit.*, pp. 277-307; Noradounghian, *op. cit.*, IV, 175-192.)

²⁷ See also, articles 20, 37, 49.

²⁸ See J. S. Kandelafté, *L'Avenir réservé au régime des capitulations en Turquie*, p. 47. Also, J. W. Foster, *The Practice of Diplomacy*, N. Y., 1906, p. 245.

recognized by the western powers on many occasions and is admitted by the vast majority of writers on international law. Westlake, however, seems to uphold the contrary view. He maintains that the system "is sufficiently uniform to be capable of treatment as a branch of practical international law."²⁹ It is also to be noted in this connection that in supporting the idea that American citizens in China should not be subjected to the local courts, Mr. Cushing, who negotiated the first Sino-American treaty, contended that the United States should demand extraterritorial privileges in China for her citizens not as a matter of concession upon the part of China, but as a principle of "established international law." Dr. Koo, with whom Professor Willoughby agrees, criticizes Mr. Cushing's argument and maintains that the extraterritorial system in China owes its legal existence to concessions made by China in her treaties with western powers.

While joining Dr. Koo in this criticism, Dr. Willoughby seems, on the other hand, to conclude that the claim to extraterritorial rights in China cannot be founded on the same basis as that supporting the capitulations in Mohammedan countries or as that of personality of laws which prevailed in Europe prior to the fifteenth and the sixteenth centuries.³⁰

²⁹ J. Westlake, *International Law*, 2d ed., Cambridge, 1910, part 1, Peace, p. 289.

³⁰ W. W. Willoughby, *Foreign Rights and Interests in China*, Baltimore, 1920, pp. 16-18.

This conclusion seems to suggest that Professor Wiloughby considers the capitulations in the Near East and the system of personality of laws which prevailed in Europe prior to the fifteenth and the sixteenth centuries as being identical in character, but differing in status from the extraterritorial system in China. He seems to emphasize the idea that the capitulations in Turkey were willingly granted and hence they have a different status from the extraterritorial system in China. It is to be admitted that the Turkish capitulations have a different origin from that of the Chinese extraterritorial system, but, so far as the anomalous situation with regard to international law is concerned, we can find no marked distinction existing between the status of the later extraterritorial system in China and the status of the capitulations in the Near East; both systems are exceptional and anomalous; they can hardly be considered as operating under an established principle of international law. Hence, it appears that, if there is any distinction at all, that distinction, in so far as the principles of international law are concerned, lies between the latest régime of the capitulations of Turkey or the extraterritorial system of China, on the one hand, and the system of personality of laws which prevailed in most countries prior to the fifteenth and the sixteenth centuries, on the other. The latter was uniformly and mutually practised by the general powers, the former exceptionally and unilaterally applied. In this

respect, we may be safe in saying that the system of personality of laws as practised prior to the fifteenth and the sixteenth centuries might be considered as having acquired a status in international law at that period, had international law been developed then; but the same can hardly be true of the latest capitulations in Turkey or of the extraterritorial jurisdiction in China which were practised only in the orient and admitted nowhere by western nations. "This jurisdiction," says Wilson, "is exceptional, furnishes no precedents for international law, tends to become more restricted, and will doubtless gradually disappear." Professor Wilson does not seem to presume the existence of any difference in status between the extraterritorial jurisdiction in China and the capitulatory régime in the Near East.³¹

³¹ G. G. Wilson and G. F. Tucker, *International Law*, 2d ed., N. Y., 1902, p. 194.

VITA

Nasim Sousa was born in 1901 in Hillah, Iraq (Mesopotamia). He received his preparatory education under the guidance of private instructors and in a French Preparatory School. He later continued his studies at the Preparatory School of the American University of Beirut, Syria, from which he was graduated in 1924. After attending the first year of the College of Arts and Sciences at that University, he continued his work in the United States. In the State of Texas he attended the Agricultural and Mechanical College of Texas, College Station, the North Texas Agricultural College, Arlington, and the University of Texas, Austin. He received the degree of Bachelor of Science in Civil Engineering from Colorado College, Colorado Springs, Colorado, in 1928, and the degree of Master of Arts in political science from the George Washington University, Washington, D. C., in February, 1929. Continuing his postgraduate work at the latter institution, he later attended the summer quarter of 1929 at the University of Chicago and immediately thereafter he entered the Johns Hopkins University where he was admitted as a candidate for the Ph. D. degree to present himself for the final examinations in June, 1930.

